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No.

In the Supreme Court of the United States

NAPERVILLE READY MIX, INCORPORATED, T&W TRUCKING, INCORPORATED, WEHRLI EQUIPMENT COMPANY,

Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD and TEAMSTERS LOCAL 673,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether the National Labor Relations Act requires a company to bargain over a decision to close part of its business, sell substantial assets, and then subcontract the work previously accomplished using those assets, simply because labor costs were a factor in that decision.

II. Whether the National Labor Relations Board violated the Administrative Procedure Act by failing to apply its "alter ego" analysis in concluding that a sale of assets was a "sham transaction," where it is undisputed that title to the assets had properly passed from one corporation to another.

CORPORATE DISCLOSURE STATEMENT

Naperville Ready Mix, Incorporated, T&W Trucking, Incorporated, and Wehrli Equipment Company are privately-held corporations. They have no parent companies and there are no publicly-held companies owning 10% or more of their stock.

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PETITION FOR WRIT OF CERTIORARI

Petitioners, Naperville Ready Mix, Incorporated, T&W Trucking Incorporated, and Wehrli Equipment Company (collectively "NRM"), respectfully petition this Court for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit. NRM seeks reversal of the Seventh Circuit's enforcement of the National Labor Relations Board's ("NLRB") finding that NRM violated §§8(a)(1), (3) and (5) of the National Labor Relations Act ("NLRA") by selling its delivery trucks and engaging independent contractors to perform delivery work without bargaining to impasse over this decision.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit enforcing the NLRB's decision is published at 242 F.3d 744 and is set forth in the Appendix, at App. 1. The Seventh Circuit's Order denying NRM's Petition for Rehearing and Suggestion for Rehearing En Banc is set forth in the Appendix, at App. 102.

The decision of the NLRB is published at 329 NLRB No. 19, 166 LRRM (BNA) 1244, and is set forth in the Appendix, at App. 24. The decision of the NLRB Administrative Law Judge is set forth in the Appendix, at App. 76.

JURISDICTION

On March 6, 2001, the Seventh Circuit enforced the NLRB's determination that NRM violated NLRA §§8(a)(1), (3), and (5). 29 U.S.C. §§158(a)(1), (3) and (5). (App. 1). On May 17, 2001, the Seventh Circuit denied NRM's timely Petition for Rehearing and Suggestion for Rehearing En Banc. (App. 102). This Petition for Certiorari is timely filed within 90 days of the latter order.

NRM invokes this Court's jurisdiction pursuant to 28 U.S.C. §1254(1) and 29 U.S.C. §160(e).

STATUTES INVOLVED IN THIS CASE

The relevant text of Section 7 of the National Labor Relations Act, 29 U.S.C. §157, is reproduced in the Appendix, at App. 104.

The relevant text of Sections 8(a)(1), (3), and (5) and Section 8(d) of the National Labor Relations Act, 29 U.S.C. §§158(a)(1), (3), (5), and (d) is reproduced in the Appendix, at App. 104-105.

The relevant portion of the Administrative Procedure Act, 5 U.S.C. §706, is reproduced in the Appendix, at App. 105-106.

STATEMENT OF THE CASE

BASIS FOR FEDERAL JURISDICTION

The Court of Appeals had jurisdiction pursuant to 29 U.S.C. §160(f), which provides that any person aggrieved by a final order of the NLRB may petition for review of the NLRB's Decision and Order in the Circuit where the alleged unfair labor practice occurred.

STATEMENT OF FACTS

Events Leading Up To The Unfair Labor Practice Charges

NRM sells ready-mix concrete to commercial customers. Since the early 1960s, NRM owned and operated a fleet of concrete delivery trucks, and it employed truck drivers represented by Teamsters Local 673 (the "Union"). Until April 1992, NRM's drivers worked under a series of collective bargaining agreements.

In May 1992, after the expiration of the collective bargaining agreement and during negotiations with the Union for a new contract, NRM decided to restructure its business operations. Facing strong competitive pressures and some financial difficulties, NRM's President, Richard Wehrli, determined that it was in NRM's best interest to get out of the concrete delivery business and sell all of NRM's concrete delivery trucks. Wehrli knew that once NRM removed itself from the concrete delivery business, it could use independent contractors to ensure the continued delivery of concrete to its customers.

On May 12, 1992, Wehrli sent the Union's bargaining representative the following letter:

> I have decided to go out of the trucking business and am offering to sell my trucks to my present drivers first, and then any leftover trucks will be offered to outsiders. I intend to use individual contractors for all my trucking needs. If you want any discussion with me in this regard feel free to call.

(App. 3). The Union refused to discuss Wehrli's offer to sell trucks to his drivers. In six subsequent bargaining sessions, the Union rejected all of Wehrli's bargaining proposals to change the collective bargaining agreement so that it would not restrict NRM's use of independent contractors.

NRM's truck sale plan faced an urgent deadline. If NRM sold its trucks before July 1, 1992, it could avoid paying over $40,000 in license renewal fees. (App. 32). Confronted with this fiscally-important deadline and the Union's intransigence, NRM unilaterally implemented its truck sale plan and sold all of its concrete delivery trucks. Ten trucks were purchased by three of NRM's current drivers (who became independent owner-operators), and another seven trucks were purchased by three others, including two individuals who responded to NRM's newspaper advertisement. NRM properly transferred legal title to the trucks,

and title to each truck was ultimately held by wholly separate corporate entities owned by the purchasers. The trucks were sold for purchase prices totaling $870,000.

To facilitate the truck sales and to ensure sufficient access to independent contractors, NRM offered favorable secured financing to the truck purchasers in exchange for the purchasers' agreement to give NRM first priority in their concrete hauling work. Aside from this first priority obligation, the independent contractors were free to pursue other work and run their businesses as they saw fit.

The Unfair Labor Practice Charges and The Administrative Law Judge's Decision

In June and July 1992, the Union filed unfair labor practice charges against NRM, asserting, *inter alia*, that NRM had violated NLRA §§8(a)(1) and (5) by implementing its truck sale plan without first bargaining to impasse with the Union.

The legal analysis of a company's bargaining obligations is framed by three cases from this Court—*Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203 (1964), *Textile Workers Union of America v. Darlington Manuf. Co.*, 380 U.S. 263 (1965), and *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981). In proceedings before Administrative Law Judge Robert Wallace (the "ALJ"), the NLRB General Counsel argued that NRM's truck sales were illegitimate "sham transactions," that NRM continued to control the trucks despite their sale, and that NRM had engaged in nothing more than a pure subcontracting arrangement—a mandatory subject of bargaining under *Fibreboard*. In response, NRM demonstrated that the truck sales were legitimate, arms-length transactions and that title and control of the trucks had properly passed to third-party corporations that were separate and distinct from NRM. As such, NRM's truck sales were part of a legitimate

entrepreneurial partial-closing decision which, under *Darlington* and *First National Maintenance*, is not a mandatory subject of bargaining. Although NRM ultimately subcontracted its concrete delivery work, it did so as part of a plan to terminate its direct involvement in trucking operations and its ownership of trucking assets.

Following an extensive evidentiary hearing, the ALJ issued a decision on October 13, 1995 rejecting the General Counsel's "sham transaction" argument and finding that NRM had no duty to bargain over its truck sales. (App. 76, 90, 100). The ALJ determined that since NRM engaged in a legitimate entrepreneurial decision to sell its assets and quit the trucking portion of its business, it had no mandatory bargaining obligation under *Darlington*. (App. 90, 100). 380 U.S. 263. *See also First National Maintenance*, 452 U.S. 666. Without a bargaining violation, the other charges against NRM had no foundation and were also dismissed by the ALJ.

The NLRB Proceedings

Almost four years later, on September 21, 1999, the Board reversed the ALJ. Like the ALJ, the Board focused on NRM's truck sales, stating that "whether [NRM] went out of the trucking business . . . *is really the pivotal question*" and that "[t]o answer this, we must look at the transactions which governed the transfer of trucks from NRM[.]" (App. 42) (emphasis added). Unlike the ALJ, however, the Board found that NRM's truck sales were "sham transactions" and that NRM continued to control the trucks despite their sale to third-party corporations. (App. 47-48, 52). In reaching this conclusion, the Board never applied its alter ego doctrine, which has been the basis for all prior findings of a "sham transaction" with respect to the sale of corporate assets. The Board provided no legal support for a finding that NRM asserted control over

trucks that were owned and operated by corporations wholly separate from NRM.

According to the Board, NRM did not engage in a *First National Maintenance* partial closing because NRM did not truly sell its trucks. Consequently, the Board concluded that NRM did nothing more than substitute subcontracted employees for its unionized employees—an arrangement that cannot be undertaken without first bargaining with the Union to impasse. (App. 52-53). *Fibreboard*, 379 U.S. at 404. As a result, the Board found merit in the other allegations of the Complaint and ordered reinstatement and backpay for all of the drivers who lost their jobs due to NRM's sale of its trucks.

Proceedings in the Court of Appeals

On appeal to the United States Court of Appeals for the Seventh Circuit, NRM principally disputed the Board's analysis of the "pivotal question"—the legitimacy of NRM's truck sales. NRM assumed, as did the General Counsel, ALJ, and NLRB, that this case would be governed by *First National Maintenance* (and that NRM would have no bargaining obligation) if NRM's truck sales were deemed legitimate, not "sham" transactions. Accordingly, NRM illustrated how the Board's "sham transaction" conclusion was both factually unfounded and based on an arbitrary and capricious legal analysis that failed to adhere to the Board's established "alter ego" precedents.

Despite the fact that this case had always focused on the legitimacy of NRM's truck sales, the Seventh Circuit found the truck sales entirely irrelevant. According to the Court:

> NRM has devoted considerable energy in its appellate briefs to explaining why the sales were not "sham transactions," as that term is used in alter ego or single employer cases. . . But, as we read the Board's

> opinion, it was not invoking that doctrine (despite its somewhat careless use of the phrase "sham transaction" here and there). It was not the Board's contention that NRM continued to own the trucks at issue; there is no dispute that title was legally transferred. The Board was saying only that the transactions were phony, or "sham" insofar as their employment consequences were concerned. NRM sold the trucks, but it did so as part of a plan that allowed it to remain in the business of delivering ready-mix, albeit using non-union subcontractors instead of bargaining unit employees.

(App. 12-13). Chalking-up the Board's "sham transaction" findings to mere carelessness, the Seventh Circuit determined that NRM engaged in *Fibreboard* subcontracting *regardless* of whether or not it sold any assets. According to the Court, NRM's consideration of labor costs in its decision *automatically* imposed a bargaining obligation:

> After *Fibreboard* and *First National Maintenance*, when an employer chooses to subcontract unit work in order to save on labor costs, that choice typically does not involve a change in the scope and direction of the enterprise and thus is not a core entrepreneurial decision beyond the scope of the Act's bargaining obligation.
>
> . . .
>
> [T]he plan to move to an owner-operator system was motivated by a desire to reduce labor costs. This is precisely the kind of concern that *Fibreboard* and *First National Maintenance* instruct is particularly amenable to resolution through collective bargaining.

(App. 13-14). As a result, the Seventh Circuit never considered NRM's principal arguments about the legitimacy of its truck sales and about the Board's arbitrary and capricious failure to follow its established precedents.

NRM is now compelled to restore its nine-year defunct trucking operation, pay nine years back pay with interest to its terminated truck drivers, and reinstate those drivers to their former positions.

REASONS FOR GRANTING THE WRIT

I.

IN THE TWENTY YEARS SINCE *FIRST NATIONAL MAINTENANCE* AND THE THIRTY-SEVEN YEARS SINCE *FIBREBOARD*, THE APPLICATION OF THESE TWO CASES HAS BECOME CONFUSING FOR BUSINESSES AND COURTS ALIKE

How can a company determine whether or not it has a duty to bargain in a given situation when, as in this case, the adjudicating bodies—the ALJ, NLRB, and Seventh Circuit—could not agree on the proper legal analysis, let alone the proper application of that analysis to the facts?

In this case, the General Counsel, ALJ, and NLRB all recognized the importance of the truck sales in determining whether this case is a *Fibreboard* (subcontracting) case or a *Darlington/First National Maintenance* (entrepreneurial partial closing) case. Consequently, the ALJ and NLRB focused their Opinions primarily on the truck sales and on whether NRM continued to control the trucks after their sale. The Seventh Circuit, however, considered the truck sales completely irrelevant, finding instead that NRM's bargaining obligations hinged exclusively on whether NRM considered labor costs in its decision to sell its trucks and subcontract its delivery work.

The disparate analyses employed by the ALJ and NLRB on one hand, and the Seventh Circuit on the other, highlight the confusion prevalent in the application of *Fibreboard* and *First National Maintenance*. The ALJ and the NLRB rightly focused on the extent to which NRM continued to control the trucks after their sale; the Seventh

Circuit ignored the partial closing aspects of this case and treated it like a pure subcontracting case. These conflicting approaches, apparent in this case and others, create tremendous uncertainty as to when companies may legitimately sell their assets and change the direction of their businesses without running afoul of the NLRA. Without more definitive guidance from this Court, a business considering a partial closing faces a Hobson's choice: either (a) risk an enormous back-pay award and the restoration of long-defunct operations if the Board later conjures up a bargaining requirement; or (b) bargain with the Union to impasse (which unions are adept at delaying, if not wholly avoiding) and lose much of the speed and flexibility that is often necessary to implement a partial closing decision in a competitive business environment.

To replace the current ambiguity, this Court should announce a clear rule that when a company decides for entrepreneurial reasons to sell substantial assets and close part of its business, it has no obligation to bargain over this decision, regardless of whether the company later engages in subcontracting and regardless of whether labor costs may have been a factor in the decision. Such a rule would protect long-recognized, fundamental entrepreneurial rights, would guide the Board and the courts to more principled decisions, and would provide the clarity businesses need to conform their actions to the law.

A. *Fibreboard* and *Darlington/First National Maintenance* outline the scope of NLRA bargaining obligations in partial closing and subcontracting situations

The NLRA requires collective bargaining over "wages, hours, and other terms and conditions of employment." 29 U.S.C. §158(d). A company may not unilaterally implement a change in a subject encompassed by this definition with-

out first bargaining to impasse with the Union. *First National Maintenance*, 452 U.S. at 675. The scope of the NLRA's bargaining mandate was the subject of the *Fibreboard* and *Darlington/First National Maintenance* decisions.

1. The *Fibreboard* Decision

Fibreboard involved a pure subcontracting decision. The company, which was concerned about high labor costs in its maintenance operations, decided to hire an independent contractor to perform its maintenance work and replace its unionized maintenance staff. 379 U.S. at 205-206. The independent contractor only provided Fibreboard with a labor force—*Fibreboard continued to own the equipment used by the contractors*. *Id.* at 213. Fibreboard simply substituted one set of workers for another—everything else remained the same. *Id.*

This Court determined that, under those facts, Fibreboard had a duty to bargain to impasse with the Union before implementing its subcontracting decision. Fibreboard's subcontracting decision was well-suited for collective bargaining because:

> The Company's decision to contract out the maintenance work did not alter the Company's basic operation. The maintenance work still had to be performed in the plant. *No capital investment was contemplated; the Company merely replaced existing employees with those of an independent contractor to do the same work under similar conditions of employment*. Therefore, to require the employer to bargain about the matter would not significantly abridge his freedom to manage the business.

Id. at 213 (emphasis added).

In an influential concurring opinion, Justice Stewart elaborated on the limits of the *Fibreboard* holding. He cautioned against requiring a company to bargain over core entrepreneurial decisions, such as the commitment or use of capital assets, because this would impermissibly infringe on a company's freedom to operate its business effectively. As he stated,

> An enterprise may decide to invest in labor-saving machinery. Another may resolve to liquidate its assets and go out of business. *Nothing the Court holds today should be understood as imposing a duty to bargain collectively regarding such managerial decisions, which lie at the core of entrepreneurial control.*

Id. at 223 (Stewart, J. concurring) (emphasis added). According to Justice Stewart, the key fact that distinguished Fibreboard's subcontracting decision from a core entrepreneurial decision was the employer's level of continued *control*:

> On the facts of this case, I join the Court's judgment, because all that is involved is the substitution of one group of workers for another to perform the same task in the same plant *under the ultimate control of the same employer. . . . This kind of subcontracting falls short of such larger entrepreneurial questions as* what shall be produced, *how capital shall be invested in fixed assets*, or what the basic scope of the enterprise shall be. In my view, the Court's decision in this case has nothing to do with whether any aspects of those larger issues could under any circumstances be considered subjects of compulsory collective bargaining under the present law.

Id. at 224-225 (Stewart, J. concurring) (emphasis added).

2. The *First National Maintenance* Decision

In its 1981 decision in *First National Maintenance*, this Court built on Justice Stewart's *Fibreboard* concurrence and on the 1965 *Darlington* decision, which held that a company had no bargaining obligation over a decision to completely shut down its operations. *Darlington*, 452 U.S. 666. First National Maintenance, which provided housekeeping services under contract with various business customers, was challenged for failing to bargain about its decision to cease operations at one customer's location and terminate the employees who worked there. *First National Maintenance*, 452 U.S. at 668-670. Quoting extensively from Justice Stewart's *Fibreboard* concurrence, this Court held that First National Maintenance's partial closing decision was not a mandatory subject of bargaining. As the Court explained:

> [T]he harm likely to be done to an employer's need to operate freely in deciding whether to shut down part of its business purely for economic reasons outweighs the incremental benefit that might be gained through the union's participation in making the decision, and we hold that the decision itself is not part of §8(d)'s "terms and conditions" . . . over which Congress has mandated bargaining.

Id. at 686.

The *First National Maintenance* Court flatly rejected mandatory bargaining over partial closing decisions, even if such decisions are based on labor cost reasons. As the Court stated, "If labor costs are an important factor in a failing operation and the decision to close, management will have an incentive to confer *voluntarily* with the union to seek concessions that may make continuing the business profitable." *Id.* at 682 (emphasis added). Entrepreneurial rights trump the NLRA's collective bargaining requirements. *Id.* at 678-79 ("Management must be free from the

constraints of the bargaining process to the extent essential for the running of a profitable business.").

B. There Is Tremendous Confusion Over The Proper Application of *Fibreboard* and *Darlington/First National Maintenance*

After *Fibreboard* and *Darlington / First National Maintenance*, the legal landscape can be summarized as follows: a partial closing decision is not a mandatory subject of bargaining; a subcontracting decision is a mandatory subject of bargaining, except where it involves a change in the scope or direction of the enterprise. Confusion arises, however, in cases like this one that intersect both *Fibreboard* and *Darlington / First National Maintenance*. How do you characterize such cases? What distinguishes a "subcontract" from a "partial closing" when a company both closes part of its business and subcontracts the work? Does the distinction hinge on the extent of the company's continued control of the assets and the labor force, or does the distinction hinge on whether the company considered labor costs in its decision? The Board and the Courts of Appeals have provided no clear answers to these questions.

1. This case illustrates the confusion in the law

In this case, the General Counsel, ALJ, and NLRB all agreed on the pivotal question—whether NRM continued to control the trucks after their sale. (App. 42, 92). NRM had no duty to bargain if it legitimately sold its trucks (*First National Maintenance*); NRM only had a duty to bargain if it continued to control the trucks and their drivers even after the asset sale (*Fibreboard*). This is why the Board elaborated on the particulars of NRM's truck sales and on NRM's level of continued involvement with the trucks. (App. 47-53). If the truck sales were irrelevant

to the analysis, and NRM had a duty to bargain regardless of the truck sales, neither the General Counsel nor the NLRB would have bothered to analyze these transactions in such detail.

But to the Seventh Circuit, the Board's detailed truck-sale analysis was merely "careless" use of language. (App. 12). The Seventh Circuit proceeded to ignore the partial-closing aspects of this case and instead treated it like a prototypical subcontracting case. Strikingly, the Seventh Circuit pronounced that there was "no dispute" that NRM had in fact relinquished ownership of the trucks. (App. 12). To the court, however, NRM's truck sales were completely irrelevant because NRM had engaged in subcontracting—which made this a *Fibreboard* case—*regardless* of any asset sale. Under the court's view, NRM's consideration of labor costs as one of the reasons for its truck-sale plan *automatically* meant that NRM must bargain with the Union over this decision. (App. 13-15).

2. The "labor costs" rationale utilized by the Seventh Circuit and other courts in subcontracting/partial closing cases is fundamentally unworkable

a. The varying approaches of the Courts of Appeals

The Seventh Circuit thought that the dispositive distinction between *Fibreboard*-type subcontracting and a *First National Maintenance* partial closing is whether the company considered labor costs in its decision. (App. 13-14) ("After *Fibreboard* and *First National Maintenance*, when an employer chooses to subcontract unit work in order to save on labor costs, that choice typically does not involve a change in the scope and direction of the enterprise and

thus is not a core entrepreneurial decision beyond the scope of the Act's bargaining obligation."). The D.C. Circuit apparently agrees. In *Rock-Tenn Co. v. NLRB*, the D.C. Circuit concluded that a company's consideration of labor costs determines whether or not it has a duty to bargain, stating:

> *First National Maintenance* must be seen, then, as simply drawing a boundary—albeit a tenuous one—between decisions that appear to be driven *primarily* by labor cost considerations and those that are not; the latter are the more core entrepreneurial decisions which, as the Court noted, Justice Stewart spoke of in his concurring opinion in *Fibreboard*.

101 F.3d 1441, 1445 (D.C. Cir. 1996).

To the contrary are the Third and Fourth Circuits. In *Arrow Automotive Indus., Inc. v. NLRB*, the Fourth Circuit criticized the use of labor cost considerations to distinguish mandatory from non-mandatory bargaining situations, stating:

> As a general matter, the Board's labor-costs standard provides scant guidance or predictability to companies faced with fundamental business decisions. It also establishes an exception to the *First National Maintenance* decision that threatens to swallow its rule. As one commentator has noted, the Board's standard is problematic in itself because "management decisions may turn on labor costs *and* involve a fundamental change in the business."

853 F.2d 223, 227 (4th Cir. 1988). "Labor costs are inescapably a part of the economic picture of the enterprise, and management's consideration of them in basic business decisions does not render *First National Maintenance* inapplicable." *Id.* at 228 (holding that the company had no duty to bargain over a decision to close one of its manufac-

turing plants, regardless of whether the closing decision was motivated by labor cost reasons).

In *Dorsey Trailers, Inc. v. NLRB*, the Third Circuit likewise questioned the "labor costs" rationale. 134 F.3d 125 (3d Cir. 1998). Dorsey, a manufacturer of truck trailers, faced such a large backlog of orders that it decided to subcontract some of its production work. The Union objected, claiming that Dorsey's own unionized employees could perform this work if Dorsey were willing to pay them overtime. Thus, to the Union, Dorsey's decision directly implicated labor costs. While the court recognized that a company should have a bargaining obligation if it makes a decision *solely* based on labor costs, the court agreed with the Fourth Circuit that a company can consider labor costs, along with other economic factors, in deciding to subcontract without incurring a mandatory bargaining obligation. As the court stated,

> [E]mployers may make business decisions based on general "economic reasons," which "are not reasons distinct and apart from a desire to decrease labor costs," but that does not mean that labor costs are somehow implicated by every employer's decision intended to improve the business's bottom line.

Id. at 133 (quoting *Furniture Rentors v. NLRB*, 36 F.3d 1240, 1249-50 (3d Cir. 1994)).

b. The extent to which a company considers labor costs in making an entrepreneurial business decision is an unreasonably vague standard to distinguish between mandatory and non-mandatory bargaining situations

There is simply no clear guidance from either the Board or the Courts of Appeals about how much weight to assign

a company's consideration of labor costs in determining whether to impose a mandatory bargaining obligation. On one end of the spectrum, the Seventh Circuit in this case implied that any consideration of labor costs imposes an absolute duty to bargain. On the other end of the spectrum, the Third and Fourth Circuits indicate that labor cost considerations are dispositive in subcontracting situations only if they are the *sole* reason for the company's decision, and they are never dispositive in partial closing situations.

It is fundamentally impracticable to distinguish between mandatory and non-mandatory bargaining based on the extent to which a company considered labor costs in its decision. Every rational decision by an employer to shut down part of its business is driven by profit motivations. Consequently, almost all such decisions include labor cost considerations, since a reduction in labor costs necessarily impacts profitability. As Justice Brennan noted in his *First National Maintenance* dissent, "Even where labor costs are not the direct cause of a company's financial difficulties, employee concessions can often enable the company to continue in operation—if the employees have the opportunity to offer such concessions." 452 U.S. 666, 690 (Brennan, J. dissenting). Thus, the use of labor costs as the distinguishing factor in duty-to-bargain cases simply provides no meaningful guidance to companies seeking to comply with the law.

C. Control of the assets and labor force should properly distinguish a *Fibreboard* subcontracting case from a *First National Maintenance* entrepreneurial partial closing case

Instead of using labor costs to distinguish a *Fibreboard*-type subcontracting case from a *First National Maintenance* entrepreneurial partial closing case, the Board and the courts should distinguish such cases based on the

extent to which the company continues to control the assets and labor force after the partial closing/subcontracting decision. If a company engages in subcontracting without first legitimately selling or relinquishing control of substantial assets, *Fibreboard* should apply, since the company is simply substituting one set of employees for another. Alternatively, if a company subcontracts work but first engages in a legitimate sale of the assets necessary to maintain part of its business, *First National Maintenance* should apply, since the company's asset sale demonstrates its commitment to changing the scope and direction of the enterprise. As Justice Stewart's *Fibreboard* concurrence makes clear, a company's continued *control* of the assets and the labor force is the key issue distinguishing whether a case is governed by *Fibreboard* or whether a case involves a core entrepreneurial decision that is not subject to a mandatory bargaining obligation. *Fibreboard*, 379 U.S. at 224 (Stewart, J. concurring).

Examining the issue of control in the instant case, NRM should have no duty to bargain. Unlike Fibreboard Paper Products, NRM made a core entrepreneurial decision, namely to sell its trucks. Although NRM ultimately utilized independent trucking contractors to deliver concrete to its customers, *it no longer owned, operated, or controlled any trucks*. NRM did not simply substitute one set of employees for another as the employer in *Fibreboard*; rather, NRM liquidated aging assets and shut down part of its business. It is this sale of assets that distinguishes NRM's case from *Fibreboard*. *See e.g. Fibreboard*, 379 U.S. at 223 (Stewart, J. concurring) ("An enterprise may decide to invest in labor-saving machinery. Another may resolve to liquidate its assets and go out of business. Nothing the Court holds today should be understood as imposing a duty to bargain collectively regarding such managerial decisions, which lie at the core of entrepreneurial control."). Of prime importance, once NRM had sold its trucks—an en-

trepreneurial decision—the Union could no longer affect NRM's decision through wage or other bargaining concessions.

An instructive case on this issue is *NLRB v. Adams Dairy, Inc.*, 350 F.2d 108 (8th Cir. 1965), *cert. denied*, 382 U.S. 1011 (1966). In *Adams Dairy*, the Eighth Circuit held, on facts virtually identical to NRM's case, that the company had no obligation to bargain over its decision to liquidate its milk delivery operation and replace its employee-drivers with independent contractors. The *Adams Dairy* court found that the company's decision to sell its trucks was a basic operational change and not simply a *Fibreboard* substitution of one set of employees for another. As the court stated:

> [A] basic operational change did take place when the dairy decided to completely change its existing distribution system by selling its products to independent contractors. After the decision was made by the dairy to sell its products dockside to independent distributors, *all of the trucks used previously by driversalesmen were sold to independent contractors*. . . Adams was not directly concerned with whether or not any given distributor sustained a profit or loss, as would have been the situation with the driver-salesmen.

Adams Dairy, 350 F.2d at 111 (emphasis added). The court determined that:

> Contrary to the situation in *Fibreboard*, then, there is more involved in Adams Dairy than just the substitution of one set of employees for another. In Adams Dairy there is a change in the basic operating procedure in that the dairy liquidated that part of its business handling distribution of milk products. Unlike the situation in *Fibreboard*, there was a change in the structure of Adams Dairy which resulted in a partial liquidation and a recoup of capital investment. *To*

> *require Adams to bargain about its decision to close out the distribution end of its business would significantly abridge its freedom to manage its own affairs.*

Id. (emphasis added).[1]

D. This Court's Guidance Is Urgently Needed To Clarify the Proper Analysis In Cases Where *Fibreboard* and *First National Maintenance* Intersect

A clear rule establishing that the level of asset and workforce control distinguishes *Fibreboard* subcontracting from a *First National Maintenance* entrepreneurial partial closing would have several advantages over the vague "labor costs" standard. It would better protect the fundamental entrepreneurial rights of businesses, would eliminate many of the vagaries of the current standardless adjudication, and would provide the guidance businesses

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[1] In *First National Maintenance*, this Court cited *Adams Dairy* as an example of a case finding no duty to bargain because of a business' change in operations. 452 U.S. at 673 fn.8. Further, the NLRB in *West Virginia Baking* cited *Adams Dairy* as an example of a company making a fundamental change in the scope of its enterprise and adopted the following statement regarding the case:

> [I]f *Adams Dairy* [citation omitted] were before us today, we would hold that a decision to "subcontract" is not subject to Section 8(d), because the employer's decision there to discontinue its distribution operation and to contract out turned upon a fundamental change in the scope and direction of the enterprise. The employer retained no control over the equipment or the employees in the subcontractors' distribution system.

299 NLRB 306, 313 (1990) (quoting *Otis Elevator Co.*, 269 NLRB 891, 893 (1984)).

need to conform their actions to the law. When a company relinquishes control of substantial assets, it should have no duty to bargain over this decision regardless of whether its decision was motivated by labor costs or whether the company later subcontracts work formerly accomplished using those assets.

1. Clarification of *Fibreboard* and *First National Maintenance* would protect fundamental entrepreneurial rights

This Court has long recognized the fundamental right of businesses to be free from unreasonable and unnecessary constraints. *See e.g. First National Maintenance*, 452 U.S. at 678 ("Management must be free from the constraints of the bargaining process to the extent essential for the running of a profitable business."). Although unionized companies have certain obligations under the NLRA, these businesses still have fundamental entrepreneurial rights that cannot be abridged. *First National Maintenance*, 452 U.S. at 680-86; *Fibreboard*, 379 U.S. at 223-24 (Stewart, J. concurring).

Giving a union the power to impede core entrepreneurial decisions—such as NRM's truck sale decision in this case—provides the union with an unfair economic weapon that can be used to halt important, time-sensitive business decisions.[2] *First National Maintenance*, 452 U.S. at 676 ("Congress had no expectation that the elected union representative would become an equal partner in the running of the business enterprise in which the union's members are employed."). Decisions to divest assets should not

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[2] For example, NRM's truck sales were time-sensitive because, as noted by the Board, NRM could save $40,000 in license renewal fees if it sold its trucks by July 1, 1992. (App. 32, n.11).

be held hostage by a union's ability to bargain ad infinitum while avoiding impasse. *First National Maintenance*, 452 U.S. at 686 ("the harm likely to be done to an employer's need to operate freely in deciding whether to shut down part of its business purely for economic reasons outweighs the incremental benefit that might be gained through the union's participation in making the decision, and we hold that the decision itself [is not a mandatory subject of bargaining].").

2. Clarification is necessary to provide businesses with the reasonable level of certainty they need to conform their actions to the law

"The courts of appeal and the Board, unable to articulate general principles that define the scope of mandatory bargaining, have often resorted to ad hoc weighings of employer and employee interests, the outcomes of which inevitably seem to express the tribunal's own values concerning appropriate labor objectives." Michael C. Harper, *Leveling the Road from Borg-Warner to First National Maintenance: The Scope of Mandatory Bargaining*, 68 Va. L. Rev. 1447, 1448 (1982). A clearer articulation of a company's bargaining obligations would result in more principled decision-making by the Board and the Courts. Without such guidance, the Board's decisions in this area will continue to fluctuate.

As this Court recognized in *First National Maintenance*, companies must "have some degree of certainty beforehand as to when [they] may proceed to reach decisions without fear of later evaluations labeling [their] conduct an unfair labor practice." 452 U.S. at 678. Companies simply cannot afford the risks attendant with not knowing whether bargaining will be required in a given situation. As in NRM's case, a company might ultimately be forced to pay a tremendous amount in back pay and be ordered to reinstate

a long-defunct operation, regardless of the expense or utility of doing so. With the vague "labor costs" standard, companies can never know for sure how the Board or the courts will ultimately perceive their decisions. A clearer rule on bargaining obligations would promote economic efficiency by better allowing businesses to conform their actions to the law.

Twenty years ago, this Court granted certiorari in *First National Maintenance* because of the importance of the issues presented and because of confusing and often conflicting analyses utilized by the Board and Courts of Appeals. 452 U.S. at 674. Once again, this Court should grant certiorari to clarify this important issue affecting the fundamental entrepreneurial rights of businesses and their ability to predict whether their actions will run afoul of the law.

II.

THE NLRB ACTED IN AN ARBITRARY AND CAPRICIOUS MANNER VIOLATIVE OF THE ADMINISTRATIVE PROCEDURE ACT WHEN IT FOUND THAT NRM HAD ENGAGED IN A "SHAM" SALE OF ASSETS TO THIRD PARTY CORPORATIONS WITHOUT APPLYING ITS ESTABLISHED ALTER EGO TEST OR ARTICULATING A REASONED EXPLANATION FOR ITS DEPARTURE FROM THIS PRECEDENT

As noted above, the proper way to determine whether *Fibreboard* or *First National Maintenance* governs a case such as this, and consequently whether a company has a bargaining obligation, is to look at whether there is a bona fide asset sale. In this case, although the Board rightfully understood that the truck sales were the key issue, it analyzed the truck sales in an arbitrary manner and wrongfully concluded that the truck sales were "sham transactions." The Board reached this conclusion without following its established precedent—the alter ego test—

which it ordinarily utilizes to determine whether corporate asset transfers are legitimate or "sham." Had the Board applied the alter ego test here, it would have been required to conclude that this is a *First National Maintenance* entrepreneurial partial closing case because NRM no longer owned or controlled the trucks after their sale. The Board's failure to follow its alter ego precedent amounts to arbitrary and capricious agency action violative of the Administrative Procedure Act ("APA"). 5 U.S.C. §706(2)(A).

A. The Board Acted In An Arbitrary And Capricious Manner By Concluding That NRM's Truck Sales Were "Sham Transactions" Without Applying Its Alter Ego Doctrine

The APA governs judicial review of administrative agency actions, including the actions of the NLRB. *Allentown Mack Sales and Svc., Inc. v. NLRB*, 522 U.S. 359, 374 (1998). The APA mandates that reviewing courts set aside agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. §706(2)(A). The APA "establishes a scheme of 'reasoned decisionmaking,'" requiring that agencies ground their decisions in logic and rationality. *Allentown Mack*, 522 U.S. at 374 (quoting *Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 52 (1983)). Under this scheme of reasoned decisionmaking, the Board, like all agencies, must adhere to its established precedents or "justify its departure from its prior decisions so that we may understand what policies it is pursuing." *Atchison, Topeka & Santa Fe Rwy. Co. v. Wichita Bd. of Trade*, 412 U.S. 800, 822 (1973). *See also Allentown Mack*, 522 U.S. at 376. When an agency acts irrationally or fails to explain a departure from precedent, its action is arbitrary and capricious and violative of the

APA. *Stardyne, Inc. v. NLRB*, 41 F.3d 141, 153 (3d Cir. 1994); 5 U.S.C. §706(2)(A).

In the instant case, the Board concluded that NRM's truck sales were "sham transactions." But since title to the trucks passed to independent third parties—a fact the Seventh Circuit expressly recognized—how could the truck sales be "sham transactions"? Even though the truck purchasers were obligated to provide NRM with first priority in concrete hauling work, they were free, as titleholders, to do whatever they wanted with the trucks. *Douglas Foods Corp. v. NLRB*, 251 F.3d 1056, 1063-64 (D.C. Cir. 2001) (when title passes to new owners, "this *alone* suggests the sales . . . were not 'sham transactions.'") (emphasis added). They could have sold the trucks outright and quit the trucking business altogether. They could have used the trucks for purposes other than hauling concrete or could have hauled concrete for companies other than NRM. The truck purchasers always had complete dominion over their trucks, and NRM had no enforceable right to disrupt this dominion.

Since NRM had no legal right to control the trucks, the only logical way for the Board to conclude that NRM maintained "control" over the trucks would be to find that NRM dominated or controlled the purchasing companies themselves. Corporations, however, are presumed at law to be "separate and distinct entities." *Alkire v. NLRB*, 716 F.2d 1014, 1018-21 (4th Cir. 1983); *Esmark, Inc. v. NLRB*, 887 F.2d 739, 753 (7th Cir. 1989). Prior to this case, whenever the Board questioned whether a transfer of assets between corporations was a "sham" designed to evade NLRA responsibilities, or whether one corporation was under the de facto *control* of another, the Board invariably applied the alter ego doctrine. *See e.g. C.E.K. Indus. Mechanical Contractors, Inc. v. NLRB*, 921 F.2d 350, 354 (1st Cir. 1990) ("alter ego analysis . . . is typically applied

where an employer attempts to avoid its obligations under a collective bargaining agreement . . . through a *sham transfer of assets*.") (emphasis added); *NLRB v. Dane Cty. Dairy*, 795 F.2d 1313, 1321 (7th Cir. 1986); *West Virginia Baking*, 299 NLRB at 313 (referring to a lack of "*alter ego* or *sham devices*" as distinguishing a partial closing situation from a subcontracting situation) (emphasis added).[3] The alter ego doctrine provides an analytical framework through which the Board can look past the presumption of corporate separateness and decide in a principled fashion whether corporations are truly independent of one another. *See e.g. Alkire*, 716 F.2d at 1018-21; *Esmark, Inc.*, 887 F.2d at 753-54 ("the NLRB has recognized this basis [the disregard of corporate separateness] for piercing the corporate veil in its 'single employer' doctrine . . . The Board's 'alter ego' doctrine is similar").

In *Douglas Foods Corp. v. NLRB*, decided after the Seventh Circuit's ruling in this case, the D.C. Circuit recognized the importance of the Board's "alter ego" doctrine in a case strikingly similar to this one. 251 F.3d at 1062-1064. In that case, the Board's failure to apply its alter ego test resulted in the D.C. Circuit reversing the Board's finding

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[3] Other cases include the following: *Korns Bakery, Inc.*, 326 NLRB 1083, 1089 (1998) (adopting ALJ decision stating, "the *alter ego doctrine* focuses on a respondent's attempt to avoid the obligations of a collective bargaining agreement through a *sham transaction* or mere technical change") (emphasis added); *IWG, Inc.*, 322 NLRB 69 (1996); *Perma Coatings, Inc.*, 293 NLRB 803, 834 (1989) ("It has long been clear that an employer cannot evade its bargaining obligations under the Act . . . by an expedient formation of what appears to be a new company, but what in fact is but a 'disguised continuance,' or alter ego of the original employer"); *Marino Elec., Inc.*, 285 NLRB 344, 351 (1987); *Stardyne*, 41 F.3d at 144-150; *Alkire*, 716 F.2d at 1018.

that a company's sale of its delivery trucks was a "sham transaction." As the court explained:

> The present case is easily distinguishable from prior instances in which we have upheld NLRB findings of "sham" transactions motivated by anti-union animus. . . *In each of these cases, the transactions occurred between the employer and an "alter ego" that allowed the "disguised continuance" of the employer's operations.*

Id. (emphasis added). Thus, the D.C. Circuit correctly recognized that in the past, whenever the Board has found that an employer has engaged in a "sham transaction" or sham sale of assets, it has consistently applied its alter ego test. *Id.*

In the instant case, the Board's failure either to follow its alter ego precedent or articulate a "reasoned explanation" for departing from this precedent is an "arbitrary and capricious" action violative of the Administrative Procedure Act. 5 U.S.C. §706(2)(A); *Stardyne*, 41 F.3d at 153. *See also Continental Web Press, Inc. v. NLRB*, 742 F.2d 1087, 1093-94 (7th Cir. 1984). Furthermore, the Board's ultimate conclusion that NRM continued to control the trucks is irrational. How could NRM exercise dominion over the trucks if the trucks were owned, operated, and maintained by wholly separate third-party corporations? As the *Douglas Foods* court explained:

> While the ALJ and the NLRB are convinced that the truck and route sales were no more than paper transactions, a review of the transactional documents makes clear that *ownership and control* of the trucks changed hands. The ALJ notes that "[o]ne must assume that the purchasers received something of value in exchange for [their] weekly payments." . . . Precisely. It is called "title." *Whatever the motivation for*

> *the sales, it is uncontestable that title has passed to new owners for at least some of the sold trucks. This alone suggests the sales, or at least some of them, were not "sham transactions."*

251 F.3d at 1064 (emphasis added).

B. Had The Board Properly Applied Its Alter Ego Test, It Could Not Have Found That NRM Continued to Control The Trucks After Their Sale

In its alter ego test, the Board considers seven factors to determine whether one corporation controls another. These factors are whether the two enterprises have substantially identical: "management, business purpose, operation, equipment, customers, supervision, and ownership." *Lihli Fashions Corp., Inc. v. NLRB*, 80 F.3d 743, 748 (2d Cir. 1996). *See also Korns Bakery, Inc.*, 326 NLRB 1083; *Bell Energy Management Corp.*, 291 NLRB 168, 174 (1988).

Had the Board applied the alter ego test in this case, it could not have concluded that NRM continued to control the trucks after their sale. The record reflects that the purchasers of the vehicles had total independence on such matters as who would drive their vehicles, what their drivers would be paid, what ICC license they would operate under, whose concrete the trucks would haul, where their trucks would park at night, who would do their repairs, where they would purchase fuel and oil, when preventive maintenance would be done, and what route to take. (*See e.g.* Tr. 172-73, 157-60, 190-203, 316, 342-59, 640-41, 658, 664-66, 691-96, 915, 918, 958-63). At the hearing before the ALJ, the truck purchasers all testified to a high degree of independence in making business and labor relations decisions. (App. 92-98). In short, the purchasers of NRM's trucks were not alter egos of NRM, and NRM did not control the trucks after their sale.

C. The Board's Unprincipled Disregard Of Its Precedents Substantially Disrupts The Ability Of Businesses To Conform Their Actions To The Law

By disregarding its precedents, as in this case, the Board perpetuates confusion and significantly hinders the ability of businesses to conform their actions to the law. While the Board is certainly entitled to change its interpretation of its governing statute, it is required to explain why it is changing its interpretation and how this new interpretation will apply to future cases. *See e.g. Bro-Tech Corp. v. NLRB*, 105 F.3d 890, 896-897 (3d Cir. 1997) ("[I]t is especially unfortunate when the Board puts forth such a patchwork of adjudications without adequate rationalization, thereby abandoning potential litigants inside a maze of decisions with no means to map an exit.").

This Court should grant certiorari in order to rectify the Board's arbitrary decision in this case and to reiterate the Board's duty to adhere to its established precedents or articulate a reasoned explanation for its departure from precedent. Otherwise, unionized employers will continue to suffer from inconsistent and arbitrary application of the law, a result Congress never intended when it passed the NLRA.

CONCLUSION

For the foregoing reasons, Petitioners respectfully pray that their Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit be granted and that this Court either: (1) reverse the Seventh Circuit and find that NRM had no duty to bargain over its decision to sell its trucks and quit the concrete delivery business; or (2) reverse and remand this case with instructions for the NLRB to apply its established precedent—the alter ego test—to determine the legitimacy of NRM's truck sales and

consequently whether NRM has a bargaining obligation over its truck sale decision under *Fibreboard* and *First National Maintenance*.

Respectfully submitted,

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Supreme Court, U.S.
FILED

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No.

In the
Supreme Court of the United States

**NAPERVILLE READY MIX, INCORPORATED,
T&W TRUCKING, INCORPORATED,
WEHRLI EQUIPMENT COMPANY,**

Petitioners,

v.

**NATIONAL LABOR RELATIONS BOARD
and TEAMSTERS LOCAL 673,**

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 99-3634, 99-3994

NAPERVILLE READY MIX, INC., *et al.*,

Petitioners/Cross-Respondents,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent/Cross-Petitioner,

and

TEAMSTERS LOCAL 673,

Intervening Respondent/Cross-Petitioner.

On Petition for Review and Cross-Application
for Enforcement of an Order
of the National Labor Relations Board
Nos. 13-CA-31031, *et al.*

ARGUED SEPTEMBER 28, 2000—DECIDED MARCH 6, 2001

Before MANION, ROVNER, and DIANE P. WOOD, *Circuit Judges*.

DIANE P. WOOD, *Circuit Judge*. Richard Wehrli owned several companies in Naperville, Illinois, which were involved in the concrete and trucking businesses. This case arose when one of the companies, Naperville Ready Mix, Inc. (NRM), decided to change the way that it would deliver concrete. The National Labor Relations Board (the

Board) concluded that NRM and several other of Wehrli's companies were a single employer for purposes of the labor laws, and it further found that the company had violated various sections of the National Labor Relations Act (the Act) through its efforts to transfer bargaining unit delivery work from employees to alleged independent owner-drivers. NRM and its affiliates, T&W Trucking, Inc. (T&W), and Wehrli Equipment Co. (WEC), have asked us to set aside the Board's order requiring reinstatement of certain drivers and restoration of the bargaining unit work; the Board requests enforcement of its order. We conclude that the Board's order is supported by substantial evidence and the law, and we thus conclude that it is entitled to enforcement.

I

Wehrli incorporated NRM in 1960, with himself and his wife Judith Wehrli as the only stockholders. Wehrli served as NRM's president, and as of 1992 the company's board consisted of Richard and Judith Wehrli, Richard's brother-in-law Jerome Doll and the Wehrlis' son Robert. In 1978, Wehrli incorporated WEC to provide repair services for NRM dump trucks and other trucks at NRM's facility on High Grove Street in Naperville. Wehrli is the sole shareholder of WEC; he served on its board of directors through 1992, when he was replaced by his son Scott. In 1987, Wehrli and a supervisor at NRM, Robert Tilly, added T&W trucking to the family of companies. Through 1992, they were T&W's sole directors and shareholders. At the time of the events relevant to this case, T&W was providing hauling services for only two companies: NRM and one other.

Ready-mix truck drivers at NRM were covered by a collective bargaining agreement that Wehrli had originally negotiated with Teamsters Local 673 (the Union) in 1986. On April 21, 1992, NRM and the Union began negotiating a successor agreement for the one that was due to expire

nine days later, on April 30. The Union's principal representative was its Secretary-Treasurer, Tom Custer, while Wehrli spoke for NRM. At the initial meeting, the Union presented a comprehensive written proposal seeking increased wages and pension benefits as well as improved job protection standards for the drivers. NRM rejected the proposal and countered with a one-year roll-over offer, with a few revisions to the health and pension plan provisions. Wehrli argued that concessions from the Union were necessary because of increased competition and declining profit margins in the ready-mix business. In the absence of concessions, he warned, he would either have to suspend trucking operations until the market improved or get out of the hauling business altogether.

When the parties met again on May 7, the Union tried to take the contract items one-by-one. NRM was not receptive to this tactic; Wehrli saw it as a ploy by the Union to win benefits comparable to those it had secured with the Northern Illinois Ready Mix Association (NIRMA), a local multi-employer bargaining group. Wehrli claimed that NRM was losing money on the delivery portion of its business, and he announced that he wanted to sell NRM's trucks and operate with owner-operator subcontractors. Custer responded by saying that if NRM were to make such a move it would have to become a party to the NIRMA agreement (as other similarly situated companies had done), which gave owner-operators the protections of union membership. Custer also commented that the Union was there to negotiate a contract, not to help NRM sell its trucks.

On May 12, Wehrli sent Custer the following letter:

> I have decided to go out of the trucking business and am offering to sell my trucks to my present drivers first, and then any leftover trucks will be offered to outsiders. I intend to use individual contractors for all my trucking needs. If you want any discussion with me in this regard feel free to call.

Custer saw this letter as a part of the overall bargaining give-and-take, as it reflected the position Wehrli had taken at the two previous bargaining sessions. He therefore saw no need to, and did not, specifically reply to the letter.

The parties held another bargaining meeting on May 14, at which they made some progress. The Union agreed to remove certain demands, and NRM agreed to modify the language in several contract clauses. Wehrli continued to assert that he intended to sell the trucks. To this end, he introduced a proposal to delete Article 24 from the contract. Article 24 provided that certain owner-operator subcontractors would be treated like bargaining unit employees for purposes of wages, union security, and benefits. Wehrli wanted it deleted because it would have defeated much of the point of his plan to sell NRM's ready-mix trucks and to rely on subcontract haulers. He made it clear that under his proposal, the new subcontract haulers would not be members of the NRM employee bargaining unit. On May 15, he reduced his proposal to writing.

Without waiting for the Union's response, Wehrli proceeded to hold meetings with NRM's drivers on May 20 and May 27. The Union had no notice of these meetings and did not approve them. At the meetings, Wehrli discussed the financial difficulties he faced and informed the drivers of his intention to sell the trucks. He promised that he would make the trucks available for purchase by current drivers and that he would assist them with the logistics of becoming owner operators and with financing the purchase of the trucks. Wehrli also stated as a *fait accompli* that if the drivers became subcontractors they would no longer be covered under the Union's contract with NRM. Finally, he informed the drivers that as trucks were sold to current NRM and outside drivers, current drivers who had not purchased trucks would be laid off in reverse order of seniority.

After Wehrli's May 20 meeting, Custer met with the drivers to discuss the status of the negotiations. The

union members voted to reject NRM's May 15 proposal, and they authorized the Union to call a strike. Custer explained that a strike was premature, because the parties were still negotiating.

In the meantime, Wehrli was proceeding unilaterally with his sales plans. By June 1, 1992, he had found two buyers for the trucks—his son Robert and a current driver, Richard Downs. He also placed advertisements in local trade papers, which yielded the names of ten prospective outside buyers. By the last week in June, Wehrli had handshake agreements with five individuals to sell nine trucks. Between June 28 and 30, he transferred title in those trucks to the new owners.

The financial terms that Wehrli set for the truck sales were favorable for the purchasers, but in return they gave up almost all control over the use of the trucks. No down payment was necessary, and Wehrli supplied the necessary financing. Each new owner-operator was to be paid $14 per cubic yard hauled, out of which $1 would go to pay principal on the debt. Wehrli retained a security interest in the trucks, under which he was entitled to find a buyer in default if NRM had a good faith belief that the driver was failing to perform the terms of the sales contract. Most importantly, there was a "first priority" provision that required the buyers to give first priority to the hauling needs of NRM so long as NRM provided reasonable notice of its intent to use the subcontractor; this requirement continued until the principal on the truck was paid off. The sales contract forbade the buyers from working for NRM's competitors within a fifteen mile radius of NRM's plant. The new owner-operators were also entitled to purchase subsidized fuel at the NRM facility and to call on NRM and WEC mechanics to perform all truck repairs. Finally, owner-operators were encouraged to store their vehicles at the NRM facility free of charge.

On July 1, five owner-operator subcontractors began hauling for NRM under these terms. Except for the nominal change in ownership of the trucks and the fact

that the new drivers were not part of the bargaining unit, there were no meaningful changes in the day-to-day business of hauling at NRM. The owner-operators all hauled exclusively for NRM; they received their hauling assignments from the same individuals and according to essentially the same procedures as the unit employee drivers had; they attended the same monthly safety meetings that NRM had always held; and they refueled, repaired, and stored their trucks at the High Grove Street facility.

Meanwhile, throughout June and July, the collective bargaining negotiations with the Union continued. There was at least one meeting in early June, and on June 15 the parties met with a federal mediator. The Union modified its offer at that meeting, as did NRM. Wehrli continued to insist on a one-year roll-over and the deletion of Article 24, but he proposed wage and benefit adjustments modeled after the Union's recently ratified contract with NIRMA. Union members rejected NRM's offer and two days later they went on strike. NRM and the Union held brief meetings June 21 and 22. At the June 22 meeting, Custer asked Wehrli how the strike might be resolved, and Wehrli responded that it was too late to resolve the strike because the trucks had already been sold. Custer requested information documenting the sales, but he did not receive it. Wehrli followed up the June 22 meeting with a letter to Custer declaring that the parties had reached impasse on the proposal to sell the trucks and subcontract NRM's hauling business. Custer rejected that claim, and the parties met again on June 25. The Union offered another modified contract proposal. NRM rejected it and instead responded on the same day with a faxed "Final Contract Proposal."

On July 1, non-unit subcontractors began delivering NRM's ready mix, and the parties held another negotiating meeting. The Union made additional concessions, and Custer told Wehrli that it would be willing to consider appropriate modifications of Article 24. At this meeting, Custer also repeated his request for information regarding

NRM's sale of its trucks. The next day, the Union's counsel sent a letter formally requesting information regarding terms and conditions of the sale of the trucks. NRM responded with a letter stating that it did not believe that the information was relevant to the ongoing collective bargaining negotiations and that the Union had to demonstrate the relevance of each document it sought access to before NRM would disclose it. The Union did not respond.

The parties met again in late July and in early August. At the August 7 meeting, the Union made a series of new proposals which NRM rejected. Finally, on August 18, NRM informed the Union by letter that it intended to sell all its remaining trucks and proposed the elimination of an additional term in the collective bargaining agreement. In the letter, NRM reminded the Union that it considered the parties to be "at an impasse on the issue of [NRM's] plan to subcontract all delivery work," but assured the Union that NRM continued to be willing to negotiate other aspects of the collective bargaining agreement.

The strike that began June 17 continued throughout this period of negotiation. Wehrli, who had already encouraged unit workers to take part in his plan to shift unit hauling work to subcontractors at the employee meetings in May, continued to talk to the striking workers about it on the picket line. Wehrli informed the strikers that he was selling his trucks and that if they wanted to continue hauling for NRM they would have to become owner-operators. He explained that once the trucks were sold there would be no more work for them. Wehrli also told striking workers that they could avoid Union sanctions for crossing the picket line by signing documents making them "financial core" members. NRM subsequently included instructions on how to become a financial core member and a form for doing so in paychecks distributed to the strikers.

Despite these efforts, most of the NRM drivers chose to remain loyal to the Union and continue the strike. In February of 1993, Custer sent NRM a letter stating that

twenty-four named strikers wanted to return to work unconditionally. NRM refused to reinstate them.

The Union filed a number of charges with the National Labor Relations Board during the course of these events. Based on these charges, the General Counsel ultimately issued a consolidated complaint against NRM and its affiliated companies. The complaint began by asserting that NRM, T&W, and WEC comprised a single employer, as did NRM and six other corporate entities (representing the "new" independent trucking companies that took ownership of some of the vehicles). Substantively, it claimed that NRM (meaning for our purposes the whole group) violated sections 8(a)(5), (3), and (1) of the Act in several respects: by interfering with the employees' union activities through interrogation and threats (section 8(a)(1)); by direct dealing with represented employees, unilaterally transferring bargaining unit work to non-bargaining unit employees, and refusing to provide information to the Union (sections 8(a)(5) and (1)); and by discharging unit employees whose work had been reassigned and refusing to reinstate unfair labor practice strikers upon their unconditional offer to return to work (sections 8(a)(3) and (1)).

The administrative law judge dismissed the charges in their entirety, but the Board reversed. 329 NLRB No. 19. It upheld the charges and ordered the company to cease and desist from the unfair labor practices it had found, to restore the delivery work to the unit employees, and to reinstate both those who lost their jobs as a result of the unilateral transfer of the delivery work to the owner-drivers and those who were not reinstated after the unfair labor practice strike.

II

In reviewing the Board's decision, we give substantial deference to both its findings of fact and its interpretations of the Act. Factual determinations must be upheld

if they are supported by substantial evidence on the record. 29 U.S.C. § 160(e). See *NLRB v. Roll & Hold Warehouse & Dist. Corp.*, 162 F.3d 513, 517 (7th Cir. 1998); *U.S. Marine Corp. v. NLRB*, 944 F.2d 1305, 1313-14 (7th Cir. 1991) (en banc). With respect to questions of law, we defer to the Board's interpretation of the statutes it is charged with administering unless its view is arbitrary or capricious. See *NLRB v. GranCare, Inc.*, 170 F.3d 662, 666 (7th Cir. 1999) (en banc).

A. Single Employer Status

NRM first challenges the Board's conclusion that NRM, WEC, and T&W are a single employer for purposes of liability under the Act. We must decide first whether the legal standard the Board used to make this determination was a permissible one. If it is, then the single employer finding is a factual determination subject only to substantial evidence review. *NLRB v. Emsing's Supermarket, Inc.*, 872 F.2d 1279, 1289 (7th Cir. 1989). NRM's attack is against both the legal standard the Board used and its factual conclusions, but we find no reversible error in either.[1]

The Board acts within its discretion when it treats as a single employer firms that operate as an integrated enterprise and "exert[ ] significant control over" the employees in question. *G. Heileman Brewing Co. v. NLRB*, 879 F.2d 1526, 1530 (7th Cir. 1989). In this case, the Board used its standard four factor test to determine whether the companies were sufficiently integrated to constitute a single employer: (1) common management; (2) centralized control of labor relations; (3) interrelation of operations; and, (4) common ownership or financial con-

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[1] Neither party has raised the question whether this decision is exclusively one to be made under federal law, or if state law bears on it as well. We therefore proceed, as the parties did, as if it is governed by federal law.

trol. See *Radio and Television Broadcast Technicians Local Union 1264 v. Broadcast Service of Mobile, Inc.*, 380 U.S. 255, 256 (1965). NRM concedes that this was the proper legal approach in general, but it argues that the Board erred by failing to give primacy to the second factor, centralized control of labor relations. The statute, however, does not impose such an inflexible weighting requirement on the Board, nor has the Board adopted such a rule for itself. At most, the Board has commented that centralized control of labor relations is a particularly important factor, see, *e.g.*, *Fedco Freightliners, Inc.*, 273 NLRB 399 (1984), but it has also consistently said that this is a contextual inquiry and no one factor is determinative. *Id.* at 399; *Bistritzky v. Service Employees Int. Union, Local 32E, AFL-CIO*, 323 NLRB 524 (1997); *NLRB v. Carson Cable TV*, 795 F.2d 879, 881 (9th Cir. 1986). The listed factors merely help to guide the Board as it assesses "whether there exists overall control of the critical matters at the policy level." *Emsing's Supermarket, Inc.*, 284 NLRB No. 41 (June 18, 1987), *enforced* 872 F.2d. 1279 (7th Cir. 1989).

On the facts, we find that the Board's single employer finding is adequately supported by substantial evidence. First, as the Board noted, there is evidence of common ownership. Wehrli and his wife owned NRM; Wehrli was the sole owner of WEC; and Wehrli owned 50% of T&W. There is also substantial evidence of shared management. Wehrli was an officer in each of the companies; he was president of NRM and WEC and he was secretary, and one of only two directors, of T&W. The other director of T&W, Bob Tilly, was a maintenance supervisor at NRM and assumed management responsibilities at WEC on or shortly before July 1, 1992. As the Board pointed out, the only other individuals involved in the management of these companies were Wehrli's wife, his son Scott, and Jerry Doll. Wehrli also testified before the ALJ that in the first four months of 1992 it was his daily practice to "come in and spend time with each of the managers and officers

and whatever titles they had of the various companies and we would go over major problems or issues that they had that they were working on." Finally, there was evidence of operational integration among the three companies, including a shared location, informal sharing of labor among the companies, and the fact that T&W and WEC served primarily, if not exclusively, the hauling and maintenance needs of NRM. Under these circumstances, the Board was entitled to conclude that the companies shared common ownership and management.

Indeed, the only factor where the record does not strongly support the Board's conclusion is the one NRM has targeted: whether there was centralized control of labor relations. Nonetheless, there is significant evidence that such centralized control existed, and even if it did not extend to all three companies, the absence of one factor is not fatal to the Board's conclusion. There is no dispute that Wehrli controlled labor relations for NRM. He was president of the company and represented it during negotiations with the Union. With respect to T&W, Wehrli was one of only two directors and on at least one occasion it was Wehrli rather than Tilly who met with the T&W workers to inform them of the consequences of not continuing to work during the NRM drivers' strike. As the Board concedes, there is little direct evidence that Wehrli controlled labor relations at WEC, but the record permits the inference that he did so. He was president of the company, regularly involved himself in the management of WEC, and exercised substantial control over major budgetary decisions. The record also suggests that it was Wehrli who directed the use of WEC and NRM employees in constructing a new ready-mix batch plant for NRM at the High Grove Street facility.

Taken as a whole, substantial evidence indicates that NRM, WEC, and T&W were highly integrated and that Wehrli, assisted by a small group of primarily family members, exercised substantial control over all aspects of the companies' affairs. We therefore find that the Board's

decision to treat them as a single employer is entitled to enforcement.

B. Failure to Bargain

The Board's decision in this case rested on one fundamental finding: that NRM's sale of its trucks was part of a plan to shift unit work to non-bargaining unit subcontractors, and that this plan was a mandatory subject of bargaining. NRM has urged all along (successfully to the ALJ) that it made an entrepreneurial decision to go out of the trucking business and that it therefore had no obligation to bargain with the Union over this plan. The Board rejected this contention, finding that NRM had not changed the basic nature of its operations. Instead, motivated by the desire to reduce labor costs, "NRM merely replaced the employees driving trucks with other employees under the 'owner-operator' rubric (or in some cases the same employees under the new title), maintaining essentially the same control over them that it had always enjoyed." 329 NLRB No. 19 at 8. As a result, the Board concluded, NRM's plan amounted to subcontracting unit work, and under section 8(a)(5) of the Act NRM was required to bargain to impasse prior to implementing it.

Before addressing the Board's decision on the merits, it is important to explain how the truck sales should, and should not, be assessed. NRM has devoted considerable energy in its appellate briefs to explaining why the sales were not "sham transactions," as that term is used in alter ego or single employer cases. See, *e.g.*, *NLRB v. Dane County Dairy*, 795 F.2d 1313, 1322 (7th Cir. 1986). But, as we read the Board's opinion, it was not invoking that doctrine (despite its somewhat careless use of the phrase "sham transaction" here and there). It was not the Board's contention that NRM continued to own the trucks at issue; there is no dispute that title was legally transferred. The Board was saying only that the transactions were phony, or "sham," insofar as their employment con-

sequences were concerned. NRM sold the trucks, but it did so as part of a plan that allowed it to remain in the business of delivering ready-mix, albeit using non-union subcontractors instead of bargaining unit employees. But that was exactly the Board's problem: a company cannot, consistent with the labor laws, shift unit work to subcontractors in order to save on labor costs without first bargaining in good faith to impasse.

The Board's conclusion that NRM's plan to shift its hauling business away from the bargaining unit and to subcontractors was a mandatory subject of bargaining is both based on a reasonable interpretation of the Act and supported by substantial evidence in the record. Section 8(a)(5) of the Act requires an employer to "bargain collectively with the representatives of his employees." The Act defines collective bargaining as "the performance of the mutual obligation of the employer and the representative of the employees to . . . confer in good faith with respect to wages, hours and other terms and conditions of employment." 29 U.S.C. §158(d). The Board appropriately relied on *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203 (1964), to support its conclusion that NRM's transfer of its hauling work to non-union subcontractors was a change in the terms and conditions of employment over which NRM was obligated to bargain. In *Fibreboard*, the Supreme Court found that a company's decision to contract out maintenance work in order to save on labor costs amounted to "replac[ing] existing employees with those of an independent contractor to do the same work under similar conditions of employment." 379 U.S. at 213. In such a situation, it held, the employer violates the Act if it does not first bargain to impasse with the union. See also *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 679-80 (1981). After *Fibreboard* and *First National Maintenance*, when an employer chooses to subcontract unit work in order to save on labor costs, that choice typically does not involve a change in the scope and direction of the enterprise and thus is not a core entrepreneurial

decision beyond the scope of the Act's bargaining obligation. See *Rock-Tenn Co. v. NLRB*, 101 F.3d 1441, 1446 (D.C. Cir. 1997) (concluding bargaining was mandatory because shift of unit work to subcontract hauling company to save on labor costs "is a prototype *Fibreboard* case").

In this case, the Board properly found that NRM's sale of its trucks was simply an element of its plan to switch unit work to lower-cost subcontractors and that under *Fibreboard* this plan could not be implemented until impasse had been reached. The record amply supports this characterization. Before and after July 1, 1992, NRM's business involved the delivery of ready-mix concrete to its customers. Neither the scope nor the manner of this aspect of its business changed in any way after July 1. To the contrary, Wehrli ensured that things would stay functionally the same by carefully structuring the sale of NRM's trucks to give NRM nearly complete control over how the trucks were used. After July 1, the same trucks were still hauling exclusively NRM's product; the drivers still received their orders from the same dispatcher and in accordance with essentially the same procedures previously used; and the trucks were still refueled, repaired, and stored at the High Grove Street site. The only identifiable difference in how NRM hauled ready-mix concrete after July 1 was that the drivers of the trucks were no longer covered by the Union's collective bargaining agreement.

There is also substantial evidence in the record that NRM's motivation for switching to subcontract haulers was to save on labor costs. Wehrli himself admitted that this was what he was doing, and his statements at the negotiating meetings leave no doubt about the matter. Wehrli's own testimony is sufficient to support the conclusion that the plan to move to an owner-operator system was motivated by a desire to reduce labor costs. This is precisely the kind of concern that *Fibreboard* and *First National Maintenance* instruct is particularly amenable to resolution through collective bargaining. 379 U.S. at 214; 452 U.S. at 669.

We agree with the Board that this case is governed by *Fibreboard*. At oral argument NRM argued strenuously that it was entitled to sell its trucks, but that is not the point. What NRM was not entitled to do under these circumstances was to shift unit work to non-union subcontractors without first bargaining to impasse with the Union. Of course, had NRM negotiated to impasse before transferring the work, there would have been no violation of the Act. We turn now to the question of whether it did so, or, if not, whether the Union waived its right to bargain over the issue.

C. Negotiating to Impasse

An employer violates sections 8(a)(1) and (5) of the Act when it unilaterally changes a condition of employment that is a mandatory subject of bargaining before bargaining has reached an impasse. *NLRB v. Katz*, 369 U.S. 736, 743 (1962); *Lapham-Hickey Steel Corp.*, 904 F.2d 1180, 1185 (7th Cir. 1990). Because an employer is only required to bargain in good faith and may ultimately refuse to amend its proposals, once impasse has been reached the employer may implement its original proposals without violating the Act. *Duffy Tool & Stamping, L.L.C. v. NLRB*, 233 F.3d 995, 996 (7th Cir. 2000). In the context of ongoing collective bargaining negotiations, however, we have recently held that the parties are required to reach an overall impasse before an employer can unilaterally implement individual proposals made during the course of collective bargaining. *Id.* at 999; see also *Visiting Nurse Services of Western Massachusetts, Inc. v. NLRB*, 177 F.3d 52, 58 (1st Cir. 1999) (same).

NRM's contention that the parties had reached impasse on the subcontracting issue is precisely the kind of partial impasse argument foreclosed by *Duffy*. Partial impasse does not justify unilateral implementation of the contested item, and it is clear both that nothing approaching total deadlock had occurred between the Union and NRM at the

time NRM unilaterally sold the trucks, and that NRM's decision to sell the trucks was not part of a larger plan to go out of business. As our earlier review of the course of events shows, collective bargaining negotiations were ongoing until at least August 7 or 18, long after NRM implemented its truck sale plan.

NRM contends in the alternative that it was not required to negotiate to impasse because the Union had waived its right to bargain over the issue of subcontracting. *Duffy* recognized that there could be exceptions to the overall impasse rule in the event that the employer could demonstrate that the union waived its right to bargain over a particular proposal or that the company would suffer severe economic consequences from a delay in implementation. 233 F.3d at 997.

To establish waiver, an employer must prove that the union's waiver of its statutorily protected right was "clearly and unmistakably articulated." *Beverly California Corp. v. NLRB*, 227 F.3d 817, 838 (7th Cir. 2000). Alternatively, a union can relinquish its right to bargain if it "insists on continually avoiding or delaying bargaining." *Serramonte Oldsmobile, Inc. v. NLRB*, 86 F.3d 227, 235 (D.C. Cir. 1996). NRM does not assert that the Union engaged in any such dilatory conduct; it must therefore show that the Union unmistakably waived its right to bargain over NRM's proposal to subcontract hauling services. NRM finds such a waiver in the Union's repeated refusal to accept its plan to shift hauling work to non-union subcontractors and its proposed modifications of Article 24. The Board properly rejected this argument. NRM's waiver theory is simply a restatement of its single-issue impasse theory using different terminology. In the context of collective bargaining negotiations, the Union's mere refusal to budge on a particular issue cannot constitute a waiver. Indeed, the Union expressed its willingness to discuss changes to Article 24 as late as the July 1 meeting, which further weakens NRM's argument. At no time did the Union refuse to negotiate or fail to negotiate in good faith

over the terms of the successor contract. The record lends ample support to the Board's conclusion that while the Union was opposed to the truck-selling plan, "it expressed willingness to try to find ways by which NRM's economic concerns could be met" and that "[t]he Union was thus responsive and persistent rather than dilatory and evasive in the negotiations." 329 NLRB No. 19 at 9. Under these circumstances, there was no waiver.

NRM finally claims that the strike entitled it to implement its shift to a system of subcontract haulers, but here it is confusing apples and oranges. It is true that when workers strike, an employer may temporarily subcontract unit work in order "to enable the employer to continue operating in an emergency situation thrust upon it by a strike." *American Cyanamid Co. v. NLRB*, 592 F.2d 356, 360 (7th Cir. 1979). But the mere fact that employees go on strike does not relieve the employer of the duty to bargain to impasse, and thus it does not permit an employer permanently to subcontract out unit work in the absence of impasse. *Id.* All of the evidence supports the Board's conclusion that NRM's subcontracting was not a temporary response to circumstances created by the strike, but rather the implementation of a carefully formulated plan for a permanent shift of unit work away from employees and over to subcontractors.

D. Failure to Provide Relevant Information

Section 8(a)(5) of the Act imposes on the employer a duty to bargain in good faith. This duty encompasses an obligation on the employer to disclose information relevant to the bargaining process. *NLRB v. Truitt Mfg. Inc.*, 351 U.S. 149, 152-53 (1956). Although there are exceptions, in general an employer violates section 8(a)(5) by failing to disclose relevant information upon request. *NLRB v. George Koch Sons, Inc.*, 950 F.2d 1324, 1330-31 (7th Cir. 1991). Whether the requested information was relevant is the threshold question and the only one in

dispute in our case. The information the Union wanted was about NRM's proposal to subcontract unit work. The burden was on the Union to demonstrate the relevance of the requested information under the very liberal relevancy standard applied in these situations. See *NLRB v. Acme Indus. Co.*, 385 U.S. 432, 437 n. 6 (1967) (applying a discovery-type relevancy standard).

The Board concluded that NRM violated sections 8(a)(5) and (1) of the Act by failing to give the Union the requested information about the sale of its trucks. At the July 1, 1992, negotiating session, Wehrli indicated to Custer that it was too late to negotiate a contract with NRM that covered the NRM drivers, because the trucks they had been driving had already been sold. Custer testified that he promptly asked Wehrli to provide him with documentation of the sales. On July 10, counsel for the Union sent a letter again requesting information regarding the nature and terms of the truck sales. Rather than providing the requested information, NRM's counsel responded with a letter disputing the Union's right to have access to the information and demanding that the Union explain how "each of the documents requested is reasonably calculated to elicit information which the Union may need to properly represent its members and a citation to case authority which supports the request." The Union chose not to respond and instead filed an unfair labor practices charge.

On these facts, there is again ample evidence to support the Board's conclusion that NRM violated the Act. The Union's request for information arose directly out of a subject the parties were discussing in connection with their collective bargaining. Under the Court's reasoning in *Truitt*, 352 U.S. at 152-53, the Union was entitled to know exactly what circumstances it faced. If NRM's truck sale claim was "important enough to present in the give and take of bargaining," then the Union was entitled to "some sort of proof of its accuracy." *Id.* NRM was aware of the relevance of this information to the Union's ability to represent unit members, and NRM's subsequent effort to

deny its relevancy is precisely the kind of bad faith negotiating tactic that is prohibited by section 8(a)(5) of the Act.

E. Direct Dealings, Negotiations, and Threats

Implicit in the obligation to bargain in good faith "is the principle that the employer is not to go behind the union's back and negotiate with individual workers, nor otherwise to undermine the union's status as exclusive bargaining representative." *Szabo v. U.S. Marine Corp.*, 819 F.2d 714, 718 (7th Cir. 1987); see also *Medo Photo Supply Corp. v. NLRB*, 321 U.S. 678, 683-85 (1944). This prohibition forecloses individual negotiations with unit employees, in most cases even if collective bargaining negotiations have reached an impasse. *McNealy v. Caterpillar, Inc.*, 139 F.3d 1113, 1118 (7th Cir. 1997). Furthermore, the duty to refrain from undermining the union's status as exclusive bargaining agent precludes promises of benefits or threats of sanctions to union members that have the effect of reducing the employees' support for their union. *Beverly California Corp.*, 227 F.3d at 817, 832-33. The Board concluded that NRM repeatedly engaged in these forms of prohibited activity.

We see no need to lengthen this opinion with yet another rehearsal of the facts. Wehrli's meetings with the drivers while negotiations were still underway and his warnings that those who did not buy a truck would be laid off support the Board's findings. NRM attempts to cast these meetings as nothing more than occasions during which Wehrli was providing accurate information to employees about a "business opportunity." In the context of the ongoing collective bargaining negotiations over the very proposal at issue, however, we find the Board's characterization more accurate: "[T]he meetings were efforts to enlist the employees in the sham transactions by which [NRM] would carry on the ready mix delivery operations without the obligations or costs of a union contract." 329

NLRB No. 19 at 11. These meetings amounted to direct dealing in violation of section 8(a)(5) of the Act.

With respect to the section 8(a)(1) violation that the Board found in connection with Wehrli's statements that the employees would lose their jobs if they did not accept the terms of NRM's subcontracting plan and that subcontractors would not be members of the collective bargaining unit, the record again supports the Board. We find no merit in NRM's procedural objection to the effect that the charges complaining of the alleged threats made at the meetings and to individual NRM employees were not timely filed. The threat charges arose from the General Counsel's investigation into precisely the situation about which the Union had complained in its charge filed June 9, 1992. The threat charges properly related back to the June 9, 1992 complaint, and the Board properly considered them.

NRM's argument on the merits that the employees could not have seen these statements as "threats," because Wehrli was simply inviting the employees to negotiate new agreements as owner-operators, is meritless as well. To constitute a prohibited threat under the Act, a statement must only "reasonably tend[ ] to interfere with, restrain, or coerce employees in the free exercise of their protected rights." *NLRB v. Q-1 Motor Express, Inc.*, 25 F.3d 473, 477 (7th Cir. 1994). The relevant perspective is that of the employees. Wehrli made it clear to unit workers at the May meetings and on the picket line that their only choice was between becoming subcontract owner-operators outside the current bargaining unit and losing their jobs. NRM concedes that this happened. The Board was entitled to conclude that the employees with whom Wehrli talked would have felt coerced into abandoning the Union in the midst of the Union's ongoing collective bargaining negotiations with NRM. The Board's conclusion that NRM violated section 8(a)(1) is well within the bounds that this record would support.

F. Wrongful Discharge and Failure to Reinstate

The Board found that NRM violated sections 8(a)(5) and 8(a)(3) of the Act by transferring unit work to non-unit personnel in order to eliminate the Union as the unit bargaining representative. The Board also found that NRM violated section 8(a)(3) of the Act by failing to reinstate employees who made an unconditional offer to return. Again, we find the Board's conclusions to be supported by substantial evidence in the record. The charges were sufficiently related to the initial complaints to be properly before the Board, and our approval of the Board's section 8(a)(5) analysis with respect to the transfer of unit work to non-unit subcontractors is equally applicable here.

Section 8(a)(3) of the Act prohibits "discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." The Board reasoned that NRM violated section 8(a)(3) when it forced union employees to choose between abandoning their union to become owner-operator subcontractors and having no job at all. In effect, the Board viewed NRM's statements as a promise that there would only be work for those who renounced their union membership. The Board properly concluded that imposing this impermissible choice upon the unit workers was a violation of the Act. See *Canteen Corp. v. NLRB*, 103 F.3d 1355, 1365-66 (7th Cir. 1997). In this case, those NRM drivers who refused to abandon the Union in order to participate in NRM's unilaterally implemented switch to subcontract hauling were constructively discharged as NRM sold its trucks and replaced bargaining unit workers with owner-operator subcontractors. The fact that the unit employees were on strike at the time is of no consequence. We thus affirm the Board's conclusion that NRM violated section 8(a)(3) of the Act by offering only those who would abandon the bargaining unit continued employment.

Finally, the Board found that NRM violated section 8(a)(3) of the Act by refusing to reinstate striking workers

who made an unconditional offer to return to work. It is settled that "unfair labor practice strikers are entitled to reinstatement upon making an unconditional offer to return to work." *Lapham-Hickey Steel Corp.*, 904 F.2d at 1188; *accord Richmond Recording Corp. v. NLRB*, 836 F.2d 289, 292 (7th Cir. 1987). The Board found, and we agree, that this was an unfair labor practices strike,[2] and there is substantial evidence in the record to support the Board's conclusion that an unconditional offer was made and that NRM did not reinstate the workers. Given the absence of any contrary evidence in the record, this evidence is sufficient to support the Board's finding that NRM failed to reinstate the striking workers in violation of the Act.

III

Last, NRM argues that the Board's order requiring restoration of NRM's trucking operations and reinstatement of employee truck drivers should not be enforced because it is unreasonable and imposes an "undue or unfair burden." NRM concedes, however, that it did not make this argument before the Board. The Act very clearly states that an objection "not urged before the Board . . . shall [not] be considered by the court, unless the failure or neglect to urge such objections shall be excused because of extraordinary circumstances." 29 U.S.C. §160(e). NRM does not point to any extraordinary circumstances justifying its failure to urge this objection before the Board and thus our hands are tied. Relying on our opinion in *NLRB v. Thill, Inc.*, 980 F.2d 1137 (7th Cir. 1992), NRM suggests that because enforcement of the Board's order is an

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[2] NRM has not tried to justify its refusal to rehire on the ground that it had hired replacement workers for economic strikers, and thus was entitled to turn away returning workers who wanted jobs that had been filled. This is understandable, as NRM's entire point has been that the hauling subset of its business had been eliminated.

equitable remedy we should use our equitable powers to decline to enforce the injunction. Even if this were an avenue open to us (which we doubt, given our duty to defer to the Board), we would decline to take it in this case, notwithstanding the Board's unfortunate delay in issuing its opinion. First, this is a point NRM saved for its reply brief, and it is therefore not properly before us. Second, as the Supreme Court held in *NLRB v. Ironworkers*, 466 U.S. 720, 725-26 (1984), courts do not have discretion to impose the costs of delay by the Board upon the wronged employees. Finally, the overall equities in this case do not favor NRM. It committed numerous violations of the National Labor Relations Act, and those violations led to the improper dismissal of bargaining unit employees. In contrast, there is no evidence of any wrongdoing on the part of the Union or the striking workers. To refuse to enforce the Board's order because of time delays that no one alleges are attributable to the Union or the unit workers would unjustifiably compound their injury.

In addition, we are not persuaded that compliance with the Board's order will impose an unusual hardship on the employer. NRM contends that the order is unreasonable because it would be forced to buy back all its trucks from the owner-operators and revert to a system of hauling that it has not used in almost eight years. The order, however, says nothing about where NRM should procure its trucks, or whether it should buy or lease them. NRM merely needs to make trucks available so that the reinstated bargaining unit employees can return to hauling ready-mix. Furthermore, there is no evidence that NRM will have any particular difficulty returning its hauling business to unit employees; NRM apparently continues to deliver ready-mix to its customers just as it did eight years ago. NRM has given us no reason to think that the transition from subcontract hauling to in-house hauling would be any more difficult than the 1992 switch to using subcontractors. For all these reasons, we conclude that the Board's order is entitled to be ENFORCED in its entirety.

NOTICE: This opinion is subject to formal revision before publication in the bound volumes of NLRB decisions. Readers are requested to notify the Executive Secretary, National Labor Relations Board, Washington, D.C. 20570, of any typographical or other formal errors so that corrections can be included in the bound volumes.

Naperville Ready Mix, Inc.; T & W Trucking, Inc.; Wehrli Equipment Co.; Diamond Ready Mix, Inc.; Fox Valley Ready Mix, Inc.; Concrete 1, Inc.; Concrete 2 Inc.; Concrete 3, Inc.; Concrete 4, Inc. *and* General Teamsters, Chauffeurs, Salesdrivers and Helpers Local Union No. 673, affiliated with the International Brotherhood of Teamsters, AFL-CIO. Cases 13-CA-31031, 13-CA-31059, 13-CA-31061, and 13-CA-31097

September 21, 1999

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS FOX AND LIEBMAN

On October 13, 1995, Administrative Law Judge Robert T. Wallace issued the attached decision. The General Counsel filed exceptions and a supporting brief and the Respondents filed cross-exceptions and a brief in answer to the General Counsel's exception.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to

affirm the judge's rulings, findings and conclusions only to the extent consistent with this Decision and Order.

The complaint in this case alleges that Naperville Ready Mix, Inc. (NRM), T&W Trucking Inc. (T&W), and Wehrli Equipment Co (WEC), as affiliated business enterprises, comprise a single employer and violated Section 8(a)(5), (3), and (1) of the Act.[1] Specifically, the complaint alleges that Respondent NRM violated Section 8(a)(1) by interfering with employees' union activities through interrogation and threats; that Respondent NRM violated Section 8(a)(5) and (1) by direct dealing with its represented employees, unilaterally transferring bargaining unit work to nonbargaining unit employees, and refusing to provide information to the Union and that Respondent NRM violated Section 8(a)(3) and (1) by discharging unit employees whose work had been reassigned and by failing and refusing to reinstate unfair labor practice strikers upon their unconditional offer to return to work. In addition, the complaint alleges that Respondent NRM and six other corporate entities—Diamond Ready Mix, Inc., Fox Valley Ready Mix, Inc., Concrete 1, Inc., Concrete 2, Inc., Concrete 3, Inc., and Concrete 4, Inc.—together comprise a single employer which violated Section 8(a)(5), (3), and (1) by circumventing its bargaining obligations to the Union, transferring out unit work and discharging unit workers, refus-

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[1] As set out in the analysis, we sustain this allegation and find that these entities are a single employer, so that the unlawful acts of any one are chargeable to all. For ease of reference, however, in describing and analyzing the course of events, we refer to the entities individually and use the term Respondents mainly when describing the legal submissions made in the Respondents' jointly filed brief.

ing to provide information to the Union, and refusing to reinstate unfair labor practice strikers.

While discussing without reaching conclusions on the named Respondents' single employer status, the administrative law judge dismissed the complaint in its entirety. Among his findings, the judge determined that Respondent NRM's decision regarding the continued conduct of its trucking operation fell within its entrepreneurial discretion and was not subject to bargaining: that the Union had waived its right to bargain over the effects of that decision; that Respondent NRM's transactions with the six newly formed companies legitimately divested it of control over the transferred assets (i.e., they were not "sham" transactions); that the Union requests for information were untimely; and that statements and questions to employees were lawful efforts to impart and/or obtain information necessary for the conduct of its business.

The General Counsel excepts to nearly all of the judge's findings and conclusions. Upon our review of the evidence, we find merit in most of the General Counsel's exceptions. Because understanding of the factual underpinnings of this case is vital to the resolutions of the issues in this case, we restate the facts of this case in detail.[2]

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[2] This statement of facts reflects findings made by the judge where they are supported by the record and additional factual findings on matters the judge did not address, where the evidence is uncontradicted. It is the Board's established policy not to overrule an administrative law judge's credibility findings unless the clear preponderance of all the relevant evidence convinces us they are incorrect. *Standard Dry Wall*

(continued...)

I. STATEMENT OF FACTS

A. The Companies

Naperville Ready Mix, Inc. (NRM), incorporated in 1960, is in the business of producing and delivering concrete, primarily for residential construction. Richard Wehrli and his wife, Judith, are the sole stockholders and serve, respectively, as corporate president and secretary. Along with Jerome Doll, Richard Wehrli's brother-in-law, and until June 30, 1992, their son, Robert, they comprise NRM's board of directors.[3] NRM, along with other companies discussed below, is located at 1805 High Grove Street in Naperville, Illinois. The High Grove site includes an office building, garage, mechanical shop, concrete batch plant, and a storage facility. Until approximately June 30, 1992, Robert Tilly was NRM's maintenance supervisor. NRM employed truck drivers, mechanics, and dispatchers. The drivers have been represented by Teamsters Local 673 (the Union) since 1960.

Richard Wehrli incorporated Wehrli Equipment Co., Inc. (WEC) in 1978 and is its sole shareholder. Along with his wife and Jerome Doll, Wehrli served as director until December 31, 1992, when his son, Scott, replaced him on the board. WEC repairs and reconstructs dump

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[2] (...continued)
Products, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951); and we have not reversed any of the judge's credibility findings in this case. In a number of instances, however, we have drawn different factual inferences from the credited or undisputed testimony.

[3] All references hereafter to "Wehrli" are to Richard Wehrli. When referring to his sons, we will use their first names.

trucks for NRM and others at the High Grove Street site. Robert Tilly serves as maintenance supervisor at WEC.[4]

T & W Trucking, Inc (T&W) was incorporated in 1987 by Richard Wehrli and Robert Tilly, each holding a fifty percent stock interest and together acting as T&W's only directors and officers. T&W hauls bulk cement, gravel, stone, precast concrete, and roof tile. T&W does not have office space at the High Grove Street location, but its trucks are usually stationed there. Tilly is T&W's president and runs its day-to-day activities from his home. From January 1, through December 31, 1992, NRM and Dukane Precast,[5] another company in which Wehrli has an ownership interest, were the only companies for which T&W provided hauling. T&W had no contract with the Union.

B. Course of Events

As stated above, NRM's truck drivers have been represented by the Union since 1960. From the early 1960's until 1986, as a member of the Northern Illinois Ready Mix Association (NIRMA), Wehrli represented NRM in contract negotiations with the Union. Upon leaving

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[4] The judge found that Tilly began working for WEC on approximately June 30, 1992. In the hearing transcript, Tilly is recorded as having testified that he joined WEC in 1994. However, based on other record evidence, it appears that Tilly assumed duties with WEC during 1992 and that he simply either misspoke at the hearing or that there is an error in the transcript.

[5] Dukane Precast is also located at 1805 High Grove Street.

NIRMA, NRM negotiated with the Union along with a group of independent companies called the Western Border Group (WBG). In 1989, Wehrli negotiated with the Union individually, resulting in an agreement with a term from May 1, 1989, through April 30, 1992. The events of this case begin with the negotiations for a successor bargaining agreement in 1992.

The parties' first bargaining session took place on April 21, 1992.[6] Union Secretary-Treasurer Tom Custer and Business Agent Ron Smith represented the Union. Wehrli, his son Robert, and Doll represented NRM. The Union submitted a written proposal, seeking changes in wages, pensions and contract language relating to work preservation and protection of standards.[7] NRM rejected the Union's proposal.

Wehrli began negotiations by remarking about the high costs of health insurance and other fringe benefits, and the unfavorable economic climate in the industry generally and for NRM in particular. He suggested that concessions might help its situation. In response to the Union's written proposal, Wehrli proposed rolling over the contract for a year, but replacing the Union's health and welfare and pension plans with the Company's own.

Either in the initial meeting or the next, Wehrli stated that without union cooperation, he might go out of the

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[6] Dates hereafter refer to 1992 unless otherwise stated.

[7] Among the Union's proposals were a $1-dollar-per-hour wage increase, decreasing the time for new employees to reach contract rate, increased pension benefits, and changes in the work preservation protection of standards language (art. 17) to conform to the same article in the NIRMA agreement

ready mix business completely, park the trucks and wait for business conditions to improve, or sell the trucks to the drivers and lease them back for company use.

Although the contract expired on April 30, the parties did not meet again until May 7. Union President Al Scholtens replaced Smith at this meeting. Ignoring the Union's request to discuss the Union's proposal item-by-item, Wehrli charged that the Union was trying to get him to agree to the same contract terms as NIRMA and WEG, but that NRM could not compete on that basis in the current residential construction climate. Wehrli stated that he was not making money on deliveries and wanted to sell the trucks to his drivers. He said that he wanted to operate like Elmhurst Chicago Stone (Elmhurst), a construction company that paid owner-operators by the number of yards of ready mix hauled, rather than at an hourly rate. Union Secretary-Treasurer Custer replied that such an arrangement would require NRM to be party to the NIRMA agreement as Elmhurst was. Custer stated further that his purpose at this meeting was to negotiate a contract, not to assist in Wehrli's selling his trucks. Wehrli asked Custer if the Union would sign contracts with owner-operators hauling cement from NRM. Custer said no, and Scholtens warned that using owner-operators could lead to a strike against all Wehrli's companies. Wehrli then reasserted his proposal from the prior meeting, i.e., rolling over the contract with revisions in the health and pension plans.

On May 12, Wehrli faxed Custer the following message:

> I have decided to go out of the trucking business and am offering to sell my trucks to my present drivers first, and then any leftover trucks will be offered to outsiders.

> I intend to use individual contractors for all my trucking needs.
>
> If you want any discussion with me in this regard feel free to call.

Custer testified that he viewed this communication merely as a bargaining ploy because it reiterated the theme Wehrli raised in the first meeting. Custer added that he thought this tactic was designed to persuade the Union to agree to roll over the current agreement thereby providing NRM with better contract terms than others in the industry. Thus, he did not reply in writing.

The parties met for the third time on May 14. The Union withdrew a number of items from its proposal. Wehrli testified that the Respondent agreed to language changes in articles 12, 13, and 17. Wehrli again said that he wanted to sell the trucks and offered a 1-year rollover and deletion of contract article 24,[8] entitled "Owner Drivers Operators" which he perceived as an obstacle to their sale. Custer repeated that he was not there to help Wehrli sell the trucks and opposed any change in article 24. Custer also advised Wehrli that Elmhurst operated

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[8] Sec. 24.1 of art. 24 provides, in part, as follows: "Owner-drivers operating their own vehicles and who are not certified carriers with proper Illinois Commerce Authority are covered within the terms and conditions of this agreement, including union security, hours, wages, overtime, health and welfare and pension and working conditions." Sec. 24.2 reads: "The Employer of such owner-drivers agrees not to enter into any agreement or contract with such owner-driver, either individually or collectively which in any way conflicts with any of the terms or provisions of this article. Any such agreement shall be null and void."

under an agreement which contained the same owner-drivers operators clause as the parties' article 24.[9]

On May 15, the Union received a written contract offer from NRM rejecting the Union's proposal and proposing the deletion of article 24 and a 1-year rollover of the remaining contract terms.

On May 20 and May 27, Wehrli held meetings with NRM drivers.[10] In the first meeting, Wehrli told employees that he was not making money and that he was either going to sell the entire business or just keep running the batch plant and sell the Company's 25 trucks to drivers who would deliver NRM's product. He told them that he could save money by selling the trucks by July 1, and therefore, drivers interested in becoming owners should decide quickly.[11] He proposed paying owner-drivers at the rate of $14 per yard and provided an estimate of how much they might earn as owner-operators. He also offered to help drivers with financing, licenses, title transfers, and insurance. He further explained that as outsiders purchased trucks, unit drivers would be laid off in reverse seniority order.[12]

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[9] Custer testified that there was nothing in the parties' existing contract that prohibited NRM from selling its trucks and operating like Elmhurst.

[10] The evidence clearly establishes that NRM managers met with employees at least on those two dates although there may have been additional occasions.

[11] NRM could save approximately $40,000 in renewal fees by not licensing the trucks.

[12] The General Counsel contends that these meetings constituted unlawful direct dealing with unit employees and that

(continued...)

After receiving NRM's May 15 written proposal, Custer met with the Union's membership to discuss the status of negotiations. At this meeting, employees told Custer about the meetings with Wehrli and his proposal to sell them NRM's trucks. The membership voted to reject NRM's proposal and gave the Union authorization to call a strike. Custer told them that since negotiations were still under way, no strike would begin without further consultation with the membership.

On May 27, Wehrli met with two NRM mechanics who had heard that NRM's trucks were for sale. Wehrli proposed that they continue to service the former NRM-owned trucks even after they were sold, but that they also operate as independent businesses, receiving payment directly from the new owner-operators rather than from NRM. In response to the mechanics' concern about their financial risk under this arrangement, Wehrli assured them that they would not be "screwed" and that he would pay them himself if a new owner driver did not.

By June 1, two NRM employees, Robert Wehrli and driver Richard Downs, had agreed to purchase NRM trucks. NRM then placed an ad in several newspapers inviting drivers interested in owning their own concrete mix trucks and doing business with an established company to contact Jerry Doll. Doll received about 50 responses. He checked the credit references listed by the

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[12] (...continued)
certain statements Wehrli made within the context of the meetings additionally violated the Act. These issues will be discussed further in the analysis section, infra.

prospective buyers by calling the references directly.[13] From this process, Doll identified 10 potential purchasers.

On June 1, Custer telephoned Wehrli, and the two agreed to meet the following week. During their phone conversation Wehrli raised the truck sale issue, but Custer said it could not be done. The June 9 meeting was attended by only Custer, Wehrli, and Robert Wehrli. Robert Wehrli told Custer that he was planning to purchase some of NRM's trucks and asked if he could individually sign a contract with the Union as an owner-driver. Custer said he could not, and then briefed them on the contract terms recently reached between the Union and NIRMA.

On June 15, Custer and Smith met with Wehrli and Doll through a federal mediator. The Union modified its proposal, and NRM proposed a 1-year rollover, deletion of article 24, and a wage and benefit increase modeled after the new NIRMA agreement.

Later that same day, the union membership voted to reject the offer and reauthorized the strike, which began on June 17.

Shortly after the strike began, Wehrli spoke with a group of strikers and told them they could haul for him as owner-drivers. He informed them that they could escape union sanctions by becoming financial core members. Thereafter, NRM distributed to employees, along with their paychecks, a document describing the process

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[13] Doll testified that he did not go through a credit company to obtain reports about those individuals and received no written credit reports.

of becoming financial core members, including a form to be completed and submitted to the Union.

Also in mid-June, Wehrli had attorney William Ullrich set up 10 corporations, named Concrete 1 through Concrete 10, with Wehrli as president and director of each, Ullrich as registered agent, and Ullrich's office as the corporate address. On June 16, Robert Wehrli had Ullrich set up Diamond Ready Mix, Inc., with Ullrich listed as registered agent and his office as the corporate address. Robert Wehrli acquired all the stock of Diamond Ready Mix, Inc. and became its sole director on June 22.

NRM and the Union met briefly on June 21 and 22. While no progress was made in these meetings, Custer testified that during the meeting on the 22nd, he asked what he could do to resolve the problem, referring to the strike. Wehrli replied that it was too late, that Custer would have to talk to his son and the other owners of the trucks because Wehrli had sold them.

In a letter to Custer dated June 24, Wehrli declared an impasse and stated he intended to implement its last offer on June 29. At the Union's insistence, however, the parties met on June 25. Although NRM offered to increase its economic package, no agreement was reached. On July 1, the Union lowered its wage demand and indicated a willingness to modify, but not delete, article 24. Wehrli asserted that his June 25 offer was final.

During the last week of June, Wehrli entered into "handshake agreements" to sell several NRM trucks. In addition to the two trucks his son Robert and the two that NRM driver Downs had earlier agreed to buy, Wehrli agreed to sell two trucks to Wehrli Equipment

mechanic Steve Weissinger,[14] two to Michael Drane, and one to Tate Haley. Drane and Haley had responded to the newspaper ad for owner-drivers and had no prior connection to NRM or any Wehrli-affiliated company.

Wehrli set the price of the trucks, required no down payment from purchasers, and established a payment rate of $14 per cubic yard of NRM ready mix hauled by the truck. He determined that $1 from each $14 payment would be applied toward the principal cost of the truck. Interest was to be at prime rate established by a particular bank, and NRM retained a security interest in the vehicles, as well as first priority on their use.

Between June 28-30, title to the vehicles identified for sale was transferred from NRM to various corporations. Robert Wehrli's trucks were placed in Diamond Ready Mix. Weissinger's trucks were titled to Fox Valley Ready Mix, Inc., his preexisting corporate shell. Wehrli transferred title to three NRM trucks into three of the recently-formed Concrete corporations, one each to Concrete 1, Concrete 2 and Concrete 3. Thereafter, Downs acquired the stock of Concrete 1, Drane purchased Concrete 2 and Haley acquired Concrete 3.[15] These five "owner-drivers" began delivering NRM ready mix on July 1.

Following the parties' July 1 meeting, Custer made a written request for information regarding the sale of the

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[14] The judge identified Weissinger as a T&W driver, but Weissinger testified that he worked for Wehrli Equipment as a mechanic.

[15] Further details about these transactions and the manner in which the new trucking companies operated will be set forth in the "analysis" section.

trucks and suggested that negotiations resume after the Union had an opportunity to review the information. The Union's attorney followed up in a July 2 letter requesting that NRM provide information relating to the sale, transfer, lease, or purchase of ready mix trucks from Naperville Ready Mix to its former employees, independent contractors, or owner-operators. The letter specifically requested purchase contracts, financing agreements, leases, and maintenance and repair arrangements and noted that failure to provide the information would result in an unfair labor practice charge being filed. NRM's attorney replied by letter of July 10, stating that NRM had the right to continue to operate during the strike, "including selling vehicles to persons to whom the company can subcontract its work."[16] Further, the letter asserted that the Union had no right to know the financial arrangements between NRM and its subcontractors and disputed the relevance of the requested information to the Union's representational function. The Union filed unfair labor practice charges alleging, inter alia, failure to provide the requested information.

At the Union's request, Wehrli met briefly with Custer in late July. Custer asked if there were some way to resolve their differences, and Wehrli said that the trucks were sold and it was too late. Nevertheless, Wehrli asked to see the contract under which Elmhurst was operating. Custer repeated that Elmhurst was party to the NIRMA agreement.

In another Union-requested meeting on August 7, Custer proffered a six-point proposal for Wehrli's consideration. It absolved NRM from responsibility to provide

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[16] GC Exh. 13.

wages or benefits to owner-operators of trucks used by NRM, extended contract coverage to previously executed employees of NRM, as well as to T&W drivers who declined to cross the picket line, required owner-operators to sign the NIRMA agreement, provided for withdrawal of unfair labor practice charges, and called for severance pay for employees who lost their jobs. Wehrli rejected all but the first item.

By fax of August 18, NRM advised the Union that it intended to sell all remaining NRM vehicles and that NRM would stop doing any of its own deliveries. To that end, NRM proposed adding to its previous (June 25) proposal, the elimination of article 17, covering subcontracting,[17] from the agreement. The message continued:

> As you know, we believe we are at an impasse on the issue of our plan to subcontract all delivery work. Of course we are still willing to bargain with you on the issue of subcontracting. However, we believe it would be more fruitful to begin bargaining over the effects of subcontracting.
>
> If you are interested in further negotiations, please call me to schedule a meeting.

The Union did not respond, and no further negotiations took place.

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[17] Art. 17 of the expired collective bargaining agreement, entitled "SUBCONTRACTING," reads as follows: "Employer agrees that it shall not lease, assign, subcontract any bargaining unit work to any person, partnership, corporation or business enterprises until or unless all of employer's equipment and work force is engaged, and/or the employer does not own the necessary equipment to perform the work."

On August 24, another T&W driver, Brad Bonnell, acquired from Wehrli, the stock of Concrete 4 under the same terms that had been set with the other new companies. Concrete 4 held the title for one NRM mixer truck and began operating immediately.

By October, the continuing strike had hurt the profitability of hauling ready mix for NRM. In response, Wehrli waived interest payments for Fox Valley and Concrete 1, 2, 3, and 4 and halved the principal payment to fifty cents per yard until January 1993. In addition, he lowered the purchase price on the trucks acquired by his son's corporation, Diamond Ready Mix.

From July 1993 through May 1994, Diamond, Fox, Concrete 1, and Concrete 2 increased the number of trucks in their fleet and expanded their operations. Concrete 3 and Concrete 4 continued to operate with one truck each.

Early in February 1993, the Union made an unconditional offer on behalf of named strikers to return to work. NRM did not recall any strikers.

II. THE JUDGE'S DECISION

Citing *Textile Workers v. Darlington Mfg. Co.*, 380 U.S. 263 (1965), the judge began his analysis with the statement that an employer's decision to go out of business is a matter within its managerial discretion and not subject to any obligation to bargain. He stated "there is no claim in the instant case that Naperville had to bargain about a decision to discontinue trucking operations." He then focused solely on NRM's obligation to bargain over the effects of its decision regarding the trucking business. Having determined that industry economics were

the basis for NRM's action, he found that the Union failed to avail itself of the opportunity to engage in effects bargaining and concluded that it waived its rights. In addition, he concluded that because a number of union members attended the May meetings in which Wehrli described to employees how they could become owner-drivers, the Union had "contemporaneous knowledge" of the meetings, thus excusing any possible lack of prior notice to the Union[18] and removing the basis for a finding of direct dealing. Moreover, he characterized the proposals that Wehrli presented to the drivers in these meetings as purely "financial and managerial in nature and not of a type giving rise to a duty to bargain."

The judge then rejected the General Counsel's contention that the July transfer of the trucks to six corporations were sham transactions, designed to continue control by NRM, and found instead a bona fide transfer of assets, with corresponding shifting of control, risk, liabilities, and responsibility away from Wehrli. He characterized the continued connection between the use of the trucks and the Wehrli-held businesses, as well as the favorable terms of sale, to be "de minimus" masters of "mutual convenience" rather than evidence of lack of arms-length business deals.

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[18] The judge stated that Wehrli testified that he was "not certain" whether he had given prior notice to the Union about the meetings and noted the Wehrli's testimony was inconsistent on this matter. Analogizing this situation to the small plant doctrine, the judge determined that because a number of union members attended these meetings, the Union had contemporaneous knowledge of them. Thus, he determined that whether or not Wehrli notified the Union was unimportant.

As for the statement of Wehrli and his son Robert to a unit driver that he would be out of a job unless he bought a truck, the judge reasoned that because NRM was planning to get out of the delivery business, such statements were not intended to discourage support for the Union, but rather merely to apprise him of NRM's plans and of the opportunity to become an owner driver. Finally, the judge dismissed the allegation that NRM unlawfully solicited strikers to resign from the Union by advising them of the financial core option. Thus, he dismissed all unfair labor practice allegations against NRM.[19]

III. THE GENERAL COUNSEL'S EXCEPTIONS

The General Counsel excepted to nearly every aspect of the judge's decision. The primary thrust of the General Counsel's exceptions is that the judge based his analysis on an erroneous premise, i.e., that there was no

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[19] We adopt the judge's dismissal of the Sec. 8(a)(1) allegation that Wehrli unlawfully interrogated nonunionized T&W drivers as to whether they would drive across the Union's picket line. Like the judge, we find this statement to be a permissible inquiry regarding whether NRM would be able to rely on T&W drivers to transport its product.

The judge also dismissed the allegation that Wehrli violated Sec. 8(a)(1) by telling T&W drivers that they would have to cross the picket line in order to keep their jobs, but we do not pass on that issue. In Sec. IV, 4, infra, we conclude that Wehrli unlawfully threatened NRM employees with job loss. Therefore, the finding of an additional violation based on Wehrli's statements to the T&W employees would be cumulative and would not affect the Order.

contention that NRM was obligated to bargain over its decision regarding its trucking operation. The General Counsel asserts that what is at issue in this case is not a decision by NRM to go out of business, but rather a decision by NRM to subcontract and transfer work outside the bargaining unit, which under the proper application of *Fibreboard*[20] and *First National Maintenance*,[21] is a mandatory subject of bargaining. The General Counsel asserts that because the judge misperceived the theory of liability argued by the General Counsel, he failed to view the evidence in its proper perspective.

We agree that the judge misperceived the essence of the General Counsel's theory and erred by assuming at the outset that NRM had, in fact, gone out of the trucking business in mid-1992. Indeed, whether the Respondent went out of the trucking business or whether it continued to engage in trucking operations albeit under a different guise is really the pivotal question. To answer this, we must look at the transactions which governed the transfer of trucks from NRM to the six other entities and the manner and terms under which those entities performed work for NRM.

Before reaching that question, however, we will first resolve the issue of the single employer status of NRM, T&W, and WEC.

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[20] *Fibreboard Paper Products Corp. v NLRB*, 379 U.S. 203 (1964).

[21] *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981).

IV. ANALYSIS

A. Single Employer

Single employer status is characterized by the absence of an arm's-length relationship found among unintegrated companies.[22] As set forth in *Central Mack Sales*, 273 NLRB 1268, 1271-1272 (1984), citing *Bryar Construction Co.*, 240 NLRB 102, 103-104 (1979), the test for single employer status is as follows:

> In determining whether two or more businesses are sufficiently integrated so that they may be fairly treated, for jurisdictional and other purposes, as a single enterprise, the Board looks to four principal factors: (1) common management; (2) centralized control of labor relations; (3) interrelation of operations; and (4) common ownership or financial control. *Radio and Televison Broadcast Technicians Local Union 1264 v. Broadcast Service of Mobile, Inc.*, 380 U.S. 255, 256 (1965); *Sakrete of Northern California Inc. v. N.L.R.B.*, 322 F2d 902, 905, fn. 4 (9th Cir. 1964). "The Board has determined that no single criterion is controlling, although it considers the first three, which evidence operational integration, more critical than the fourth, common ownership." *N.L.R.B. v. Triumph Curing Center and M.F. Lee d/b/a Lee's Sewing Company, Inc.*, 571 F.2d 462, 468 (9th Cir. 1978), enfg. 222 NLRB 627 (1976).

The evidence of common ownership among three of the named Respondents is undisputed: Wehrli and his wife share ownership of NRM, Wehrli owns WEC outright,

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[22] *RBE Electronics of S.D.*, 320 NLRB 80 (1995), citing *Hydrolines, Inc.*, 305 NLRB 416 (1991).

and he holds a 50-percent interest in T&W, with Tilly holding the other half. Wehrli's significant ownership interest in these three entities demonstrates common ownership.

At all relevant times, Wehrli served as corporate director for all three companies.[23] Tilly is the only other director for T&W, while Doll serves on the board of NRM and WEC, along with Wehrli's wife and sons. Wehrli is president of NRM, secretary of T&W, and served as president of WEC through 1992, when his son, Scott took over. Wehrli's wife is secretary of NRM and secretary of WEC. Tilly is president of T&W. The concentration of corporate authority within this limited group, with Wehrli predominant, further demonstrates their common management.

T&W's work essentially involves operating trucks to haul materials from suppliers to NRM to be used in the manufacture of concrete. At the time of the strike, this was the only work being performed by T&W. Without NRM's need for materials, T&W would have had no work and without T&W's delivering materials, NRM would be unable to produce concrete. The functional integration of these two companies is clear.

The Wehrli-affiliated companies' joint involvement in the 1990 construction of NRM's High Grove Street batch plant demonstrates their close operational interrela-

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[23] Wehrli served as director for WEC through December 31, 1992.

tion.[24] Thus, employees of WEC, aided by employees of other Wehrli-affiliated companies, performed the initial construction depending on which aspect of the assembly was involved, e.g., electrical, erecting panels, hooking generator pipe, employees having the particular expertise, irrespective of their employing entity, performed or oversaw the job. These efforts were handled casually, without formal transfers or even accounting of employee time spent working outside their own company.

These companies are located at the same address, an industrial complex at 1805 High Grove Street.[25] In addition to providing complete day-to-day operational management of T&W, Tilly served as supervisor of truck maintenance at NRM,[26] and, at some point in time,[27] assumed supervisory duties at WEC as well. Wehrli testified that during the first half of 1992, he averaged about

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[24] While the judge describes the involvement of various Wehrli companies in the batch plant construction as "illustrative of the interrelation of the affiliated companies," he drew no conclusions from these facts.

[25] While T&W does not have an office at High Grove Street, its operations are conducted there and its equipment and vehicles are maintained at that location.

[26] Tilly testified that he performed most of his T&W related duties from his home office. Because he worked for NRM however, he was physically present at High Grove Street, where he was in contact with T&W employees who worked out of that location and dropped off their log books to him there. He also testified that he used NRM's photocopy machine for T&W business.

[27] See footnote 4, supra.

4 hours a day at 1805 High Grove Street.[28] He stated that on a daily basis he conferred with officers and managers of each of his companies, reviewing issues and problems with them. Thus, the record establishes that Wehrli and Tilly together shared direct, hands-on management of NRM, T&W, and WEC.

Further demonstrative of the companies' interrelationship is the fact that while the batch plant technically belonged to WEC, NRM employees ran the plant. Wehrli explained that there were some major expenses associated with establishing the batch plant and that NRM "didn't have the money to buy any of it and Wehrli Equipment did. That is why I bought some of the bigger equipment including the Ready Mix plant with Wehrli Equipment money."[29] This cross-financing, apparently at Wehrli's unfettered discretion, is further evidence of Wehrli's broad control.

The record in this case makes clear that Wehrli exercised complete command over labor relations at NRM. As NRM's principal, he was primary management spokesman in collective bargaining throughout the Company's existence. While Tilly ran the operational aspects of T&W, Wehrli's conversations with T&W employees regarding their availability to work during a possible NRM strike—and the consequences of their refusal—demonstrate his role in setting the terms and conditions under which those employees worked. Thus, control of labor relations at NRM and T&W was vested in Wehrli. While

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[28] Although Wehrli described himself as being "semi-retired" during that period, he nevertheless might spend as much as 12 hours a day on the job, depending on circumstances.

[29] Transcript pg. 1462.

there is little record evidence concerning the handling of labor relations specifically at WEC, the evidence of Wehrli's presence, oversight, and authority over all his various companies suggests that this function at WEC, too, rested ultimately with him.

Based on the above, we find common ownership, financial control, centralized management, and functional integration among NRM, T&W, and WEC. In addition, we find clear evidence of common control of labor relations at NRM and T&W and inferential support for such a finding at WEC. We conclude therefore that NRM, T&W, and WEC operate as a single integrated enterprise, sufficient to establish them as a single employer. Accordingly, Respondents NRM, T&W, and WEC will be held equally responsible for any unfair labor practices found to have been committed in this proceeding and will be held jointly and severally liable to provide necessary remedial steps.

B. Nature and Effect of the Truck Transactions

The General Counsel argues that the judge erred in finding that the purported transfers of ownership of the trucks were not essentially sham transactions. The General Counsel further argues that the relationship between NRM and the six corporations into which ownership of certain NRM trucks was conveyed amounted to a subcontracting arrangement rather than a sale of assets. Finally, the General Counsel contends that this subcontracting arrangement was a mandatory subject of bargaining. For the following reasons, we agree.

First, we agree that the judge erred in his characterization of the nature of the relationship between NRM

and the new corporate entities. We find that NRM entered into paper transactions to give the appearance of a disposition of assets, but that after the asserted sale of the trucks, NRM continued to control their use and to operate its ready mix delivery operations in practically the same way as it had prior to the sale, except without the involvement of the Union or unit employees.

As stated above, in mid-June, in the midst of contract negotiations and within days of a strike, Wehrli instructed his attorney Ullrich to draft documents setting up ten corporate shells, Concrete 1 through 10, naming himself and Ullrich as principals.[30] Rather than sell the trucks outright, as he had told employees and the Union was a possibility, he created corporations into which he could place title to certain NRM trucks. At the same time, Wehrli's son Robert directed Ullrich to set up Diamond Ready Mix, Inc., naming Robert as president, owner, and sole director, and Ullrich as registered agent and his office as corporate address. Within two weeks of the strike, Wehrli arranged for title of several NRM trucks to be transferred to Concrete 1, 2, and 3, to Diamond Ready Mix, Inc., and to Fox Valley Ready Mix, Inc., a preexisting entity owned by former WEC employed Weissinger.

Wehrli unilaterally set all the terms governing the transactions. He had the trucks appraised and set their price, he drew up the sales agreements, he arranged for and fixed financing terms, and he established the conditions and manner in which the new corporate owners would deliver NRM's concrete—ranging from the order

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[30] Ullrich was listed as registered agent and his office address was used as the corporate address for each corporation.

in which they would pick up their loads to requiring their attendance at NRM's periodic safety meetings.

The testimony of Haley, the individual who entered into the purchase agreement for Concrete 3, illustrates Wehrli's control over the process.[31] Haley testified that in late May or early June, in response to NRM's newspaper ad, Doll advised him that to acquire the truck, he would have to purchase the corporation in which title to the truck was placed and that he would be hauling concrete for NRM. He was also told that mechanics were available to work on the truck, that he could park it at 1805 High Grove Street, that he could purchase fuel from NRM less expensively than he could elsewhere, and that he could purchase oil and grease from NRM's facility as well. In late June, Haley selected from among the available trucks and, without an independent appraisal, agreed to Wehrli's asking price of $61,000. Wehrli told him that he would provide financing for the full amount (no down payment was required) at prime rate, that he would pay him $14 per yard hauled, and that $1 dollar per yard would be taken out toward payment of the principal. He entered into a handshake agreement with Wehrli. Thereafter, on July 10, without seeking advice from an attorney of his own, Haley signed a stock sale agreement and promissory note that had been prepared by Wehrli, as well as a subcontract with T&W to perform ready mix deliveries.

The record, while not entirely clear, suggests that a similar sequence of events and processing of paperwork occurred with the purchases of the other Concrete cor-

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[31] The judge himself notes that "[t]here was little or no negotiations" in the transactions over the trucks.

porations. It appears not so much that the buyers were independent businessmen, embarking on an entrepreneurial endeavor, but rather that they were entering into a specific subcontracting arrangement to perform delivery work for NRM at NRM's direction.

The informal character of the financial arrangements is significant. As already noted, Wehrli asked for no money from the buyers up front thereby rendering nil their investment interest and equity in the trucks. Repayment was to be achieved in small portions from the payments for the hauling work actually performed. Nevertheless, Wehrli testified that he filed no liens or otherwise formally protected his considerable financial interest in these trucks. While generosity and trust may explain why Wehrli would extend unusually favorable terms to his son or even to some former employees, extending these same terms to Haley and Drane, with whom he had no previous business or personal relationship, indicates that these were not genuine sales transactions.[32]

In exchange for the "particularly favorable"[33] price and terms which the stock (truck) purchasers received from Wehrli, the stock sale agreement provides that the seller maintains first priority on the use of the truck until the buyer has fully repaid the purchase price to NRM. Thus, while this provision would explain the rationale and business purpose motivating Wehrli's financial risk, it

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[32] Wehrli testified that he did not file liens on the trucks because he trusted the new owners and did not want to embarrass them in the event they had to show the title to someone.

[33] This terminology is used in Item 16 of the stock sale agreement to describe the price and terms of the purchase.

also underscores the fundamental nature of the relationship between the parties, that is, that NRM continued to control the use of the equipment.[34]

In September or October, Wehrli extended even more financial assistance. In recognition of the business impediments brought about by the strike, Wehrli unilaterally restructured the repayment terms by cutting in half the one dollar per yard repayment rate and waiving all interest payments for six months.

Evidence of the manner in which the owner-drivers began operating further demonstrates the sham nature of the sale of the trucks. While all the new corporate owner-drivers began delivering NRM's product on July 1, only Robert Wehrli and Weissinger had entered into written subcontracting agreements by that date. Haley, Downs and Drane did not sign subcontracting agreements until July 10. All of these subcontracts were between the new owners and T&W, not NRM. T&W held the ICC operating authority for the trucks during that time, but testimony of Downs, and Haley indicates not only that they did not pay any fee to T&W for its use, but that they were not even aware under whose authority they were operating. Testimony regarding insurance coverage over the trucks was similarly vague.

The owner-drivers were assigned reporting times from T&W's dispatchers, the same individuals who had previously dispatched unit drivers for NRM. Wehrli established the order in which the trucks were called, based on seniority as to when they had agreed to become owner-drivers for NRM. They also attended safety meet-

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[34] In addition, radios owned by NRM were kept in the trucks and used without charge to the new corporations.

ings conducted by the individual who had been in charge of safety for NRM.

The degree of control Wehrli exercised and maintained from the establishment of the corporations through the effectuation of the delivery process supports a finding that these transactions were not typical, arm's-length business arrangements, but rather a stratagem designed to give the appearance, rather than the effect, of removing NRM from the ready mix delivery business. Accordingly, we find that: (1) NRM did not close its delivery operations or go out of the delivery business so as to remove the decision from the bargaining arena and, (2) NRM engaged in a type of subcontracting, involving subcontractors of its own creation and design that displayed evidence of self-dealing and subterfuge. There was no major shift in the direction of NRM's business. Rather, NRM continued to engage in the delivery of ready mix product to construction sites, the only difference being that the work formerly performed by bargaining unit drivers was being done by "owner-drivers" through an elaborate subcontracting arrangement. In addition, despite all the paperwork, NRM did not engage in a significant redirection of capital. Both before and after the purported sale of the corporations into which title of the trucks had been placed, NRM continued to bear financial risk because the new "owners" had not yet paid for the trucks. Clearly, not only did NRM remain in the ready mix delivery business, it continued to use the same equipment in which it continued to have an ownership interest.

Thus, the Respondents' basic operation remained unchanged. NRM merely replaced the employees driving the trucks with other employees under the "owner-operator" rubric (or in some cases the same employees under

the new title), maintaining essentially the same control over them that it had always enjoyed. Its motivation for engaging in this maneuver was its concern over the labor costs of a Union contract. In other words, for labor cost reasons, it essentially subcontracted the work to employees named as owners of the various corporations its attorney had set up. Such subcontracting is a mandatory subject of bargaining. See *Fibreboard Paper Products Corp. v. NLRB,* supra; *Rock-Tenn Co.,* 319 NLRB 1139 fn. 2(1995), enfd. 101 F.3d 1441 (D.C. Cir. 1996), and cases there cited.

C. Respondent's Violation of the Statutory Bargaining Obligation

Having determined that NRM's decision to, in effect, subcontract the delivery operation to the truck purchasers in the corporate framework it set up, is a mandatory subject of bargaining, we now must determine whether NRM satisfied its obligation to bargain on that subject, so that its implementation was lawful. For the following reasons, we find that it did not.

The events at issue here took place in the context of the 1992 negotiations for a successor collective-bargaining agreement between two parties that had maintained a bargaining relationship for 30 years. As the statement of facts indicates, at the very first negotiating session, on April 21, in response to the Union's proposals of 11 specific changes to language in the soon-to-expire contract, Wehrli responded with general comments that the high cost of employee benefits and adverse industry economics presented serious challenges to his operation. Early in the bargaining process Wehrli stated that he was considering taking drastic action, including the possibility

of going out of the ready mix business altogether, in order to deal with these problems. After only two meetings, Wehrli asserted that he wanted to sell his tracks, the instrumentalities with which the unit employees performed their jobs. The Union responded that the purpose of negotiations was to achieve a bargaining agreement and not to dispose of NRM's assets; and the parties continued to discuss contract terms.

At their meeting on May 14, the Union withdrew or modified a number of its demands, and agreement was reached on some items.[35] Despite this progress, NRM followed up the next day with a written demand to delete all of article 24, the clause dealing with owner-drivers providing that drivers working under such arrangements would still be covered by the collective-bargaining agreement.

Within days after that session, Wehrli met with unit employees directly, in the absence of union representatives, to discuss with them the possibility of the employees buying the trucks and performing the same work they had been performing, but doing so as "independent" drivers under contract to NRM and without union representation.[36]

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[35] This is reflected in NRM's bargaining notes.

[36] Wehrli's conduct in these meetings is alleged as direct dealing in violation of Sec. 8(a)(5), and certain statements are alleged as threats in violation of Sec. 8(a)(1). See discussions in sec. D, below. In his testimony, Wehrli referred to the drivers at these meetings as "T&W" drivers, but they are described by the judge as "Naperville drivers." Given our single employer finding, it is immaterial how they were identified.

During the following month, despite some continued dialogue with the Union, NRM took steps to implement its plan to divest NRM of ostensible ownership of the trucks, through the transactions which, as we have found above, allowed it to continue its delivery operations under subterfuge of independent contracts. After advising the Union of this action, NRM effectively terminated the employment of most of the former unit drivers,[37] refused to provide the Union with requested information relating to the truck transactions, and refused to reinstate the discharged strikers despite their unconditional request to return to work.

Indisputably in implementing the plan to lay off the drivers and provide for continuation of ready mix deliveries through the owner-operator device, NRM was acting unilaterally. As noted above, the judge concluded that this was lawful because he viewed the matter not to be a mandatory subject of bargaining. He therefore did not reach the two alternative arguments that the Respondents make in opposition to the General Counsel's exceptions, namely that the unilateral action was lawful because the Union waived its opportunity to bargain and that, in any event, the parties had reached impasse in the contract negotiations. We find no merit in these contentions.

First, the Respondents' waiver contention is misplaced because the implementation here concerned subjects which were part of the parties' negotiations for a new collective-bargaining agreement, and, as explained be-

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[37] The exceptions were Robert Wehrli and Downs, who had purchased trucks and continued to work for NRM as owner-drivers.

low, the parties had not reached overall impasse in those negotiations at the time of the implementation. The Board has held that when parties are engaged in negotiations for a collective-bargaining agreement an employer's obligation to refrain from unilateral changes encompasses a duty to refrain from implementation unless and until an overall impasse has been reached on bargaining for the agreement as a whole. *Bottom Line Enterprises*, 302 NLRB 373 (1991). In *Bottom Line*, the Board recognized only two limited exceptions to that general rule: when a union engages in bargaining delay tactics and "when economic exigencies compel prompt action." Id. at 374.

In *RBE Electronics of S.D.*, 320 NLRB 80 (1995), the Board noted that the Board in the past has limited the definition of such economic considerations to "extraordinary events which are 'an unforeseen occurrence, having a major economic effect [requiring] the company to take immediate action." *Hankins Lumber Co.*, 316 NLRB 837, 838 (1995), quoting *Angelica Healthcare Services*, 284 NLRB 844, 852-853 (1987). However, in *RBE*, the Board found that there may also be other economic exigencies, although not sufficiently compelling to excuse bargaining altogether, that should be encompassed within the *Bottom Line* exigency exception. The Board stated (320 NLRB at 82):

> [W]here we find that an employer is confronted with an economic exigency compelling prompt action short of the type relieving the employer of its obligation to bargain entirely, we will hold under the *Bottom Line* exigency exception . . . that the employer will satisfy its statutory obligation by providing the union with adequate notice and an opportunity to bargain.

The Board then went on to state that (id.):

> In defining the type of economic exigency susceptible to bargaining, however, we start from the premise . . . that not every change proposed for business reasons would meet our *Bottom Line* limited exception. Thus, because the exception is limited only to those exigencies in which time is of the essence and which demand prompt action, we will require an employer to show a need that the particular action proposed be implemented promptly. Consistent with the requirement that an employer prove that its proposed changes were "compelled," the employer must additionally demonstrate that the exigency was caused by external events, was beyond the employer's control, or was not reasonably foreseeable [Footnotes omitted.]

Applying *Bottom Line* as modified by *RBE,* we find that the Respondent has failed to prove that its actions were justified. First, the Union never refused to meet with NRM, and it expressed willingness to try to find ways by which NRM's economic concerns could be met. While the Union was opposed to the truck-selling plan, it responded to NRM's proposals by proposing ways in which NRM could operate within generally established procedures. The Union was thus responsive and persistent rather than dilatory and evasive in the negotiations. Second, the Respondents provided no evidence of an imminent financial emergency requiring prompt action on the truck-sale proposal. The fact that NRM could save some money if the scheme were implemented before July 1, when the licenses for the trucks were to be renewed (an expected event that occurred annually on that date), is an argument it might make in support of its proposal, but it in no way meets the economic exigency standard

permitting changes in terms and conditions of employment in advance of an impasse in contractual negotiations.[38] Further, even assuming arguendo that prompt action was required, Respondent has not demonstrated that the problem was caused by external events, was beyond Respondent's control or was either unforeseen or not reasonably foreseeable.

Second, the Respondents' contention that the parties had reached overall contract impasse is also without merit for two independent reasons—(1) the parties had not exhausted all possibilities for agreement, and (2) even assuming they had, no genuine impasse permitting implementation existed because it was tainted by the Respondents' unfair labor practices.

The Respondents concede that the applicable test for impasse is whether the parties, "after good-faith negotiations have exhausted the prospects for concluding an agreement."[39] Further, "the burden of proving that an impasse exists is on the party asserting the impasse."[40] One of the factors considered in determining whether an impasse was reached is "the contemporaneous under-

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[38] See, e.g., *L & L Wine & Liquor*, 323 NLRB 848, 851-852 (1997) (concern over high health insurance costs did not warrant implementation prior to contract impasse); *Sartorius, Inc.*, 323 NLRB 1275, 1285-85 (1997) (same regarding need to reduce scrap rate).

[39] *Taft Broadcasting Co.*, 163 NLRB 475, 478 (1967), aff'd. sub nom. *AFTRA Kansas City Local v. NLRB*, 395 F.2d 622 (D.C. Cir. 1968).

[40] *CJC Holdings*, 320 NLRB 1041, 1044 (1966), citing *Outboard Marine Corp.*, 307 NLRB 1333, 1363 (1992).

standing of the parties as to the state of negotiations."[41] Wehrli told the Union on June 22 that he had already sold the trucks but he did not claim a contract impasse until 2 days later. The Union disputed his impasse claim, expressed willingness to consider modifications in article 24, and sought information from NRM to aid negotiations on the issue. It continued to press for negotiations to resolve the contract issues and the strike. NRM was itself offering modified proposals even in August, after it had implemented a number of truck sales. It thus appears that there was never a contemporaneous understanding between the parties that impasse had been reached and, indeed, the Respondents had embarked on their unilateral implementation before they had exhausted their own ability to compromise, let alone considered what further concessions the Union had to offer, and before Wehrli had even advised the Union of his view of the state of negotiations. This clearly does not satisfy the Respondents' burden of showing that impasse had been reached before it implemented its proposal.

Even had the parties reached a deadlock, it would not immunize NRM's implementation of the truck sale and subcontracting plan because the impasse was tainted by the Respondents' prior unremedied unfair labor practices. "Generally, a lawful impasse cannot be reached in the presence of unremedied unfair labor practices."[42]

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[41] *Taft Broadcasting Co.*, supra, 163 NLRB at 478.

[42] *Circuit-Wise, Inc.*, 309 NLRB 905, 918 (1992) (footnote omitted); *Globe Business Furniture*, 290 NLRB 841, 854 and case cited in fn. 76 (1988). Accord: *Bryant & Stratton Business Institute*, 327 NLRB No. 174 fn. 2 and 4 (1999).

Certainly, this is the case when the timing and nature of the unfair labor practices are such as to be likely to impair the bargaining process.[43] Here, as explained in detail in Section 4 below, before the declaration of impasse, NRM had undermined the bargaining process by engaging in direct dealing with employees, threatening them with loss of their jobs if they did not participate in the Respondents' plan for carrying on the delivery operation outside of the current collective-bargaining relationship, and enticing them to resign from the Union in order to retain their jobs.

In sum, when NRM unilaterally commenced the subcontracting of its delivery work, under the guise of selling off part of the business, it had not reached either agreement or a genuine impasse in the negotiations with the Union for a successor bargaining agreement. It therefore violated Section 8(a)(5) and (1) of the Act through unilateral implementation of its scheme.

Finally, as set out in the Statement of Facts, in July, during those negotiations, the Union requested information concerning the transactions by which NRM was purporting to divest itself of the ready mix delivery operation. The request was refused in the July 10 letter from NRM's attorney, who asserted, among other things, that NRM had the right to operate during the strike, "including selling vehicles to persons to whom the company can subcontract its work" and that information regarding those arrangements was not relevant to the Union's representational functions. Because we have found that the truck sales and related arrangements amounted to

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[43] Id. at 918, citing *White Oak Coal Co.*, 295 NLRB 567, 568 (1989).

a subcontracting of unit work to entities controlled by the Respondents, the request clearly related to a mandatory subject of bargaining.[44] By refusing to provide the information, the Respondents violated Section 8(a)(5) and (1) of the Act.[45]

D. Direct Dealing, Threats, and Solicitation of Union Resignations

As set out in the Statement of Facts, Wehrli held meetings with the drivers and mechanics on May 20 and 27 at which he discussed in detail with them arrangements by which drivers might buy NRM's trucks and continue hauling ready mix and mechanics might continue to do maintenance work on such trucks. Union representatives were not at these meetings, nor had they been given notice of them. For the reasons set out in Sections 2 and 3, above, we disagree with the judge's conclusion that the meetings were essentially between potential business associates and had nothing to do with

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[44] The judge's dismissal of this allegation was predicted on his view that the truck sales were part of an entrepreneurial decision to sell off part of the business and that the Respondents had only an effects bargaining obligation with respect to that. The Union had, in his view, waived its rights to such information by refusing to enter into bargaining limited to "effects." For the reason set out above, we disagree with the premises of the judge's dismissal.

[45] See, e.g., *Facet Enterprises v. NLRB*, 907 F.2d 963, 982 (10th Cir. 1990) (violation to refuse to provide information about machinery moved out of plant because it was "relevant to the Union's fulfillment of its representational obligation to preserve its members' jobs").

the unit employees' terms and conditions of employment, which were then under negotiation with the Union. In our view, the meetings were efforts to enlist the employees in the sham transactions by which the Respondents would carry on the ready mix delivery operations without the obligations or costs of a union contract. Such direct dealing over terms and conditions of employment is a clear violation of Section 8(a)(5) of the Act.[46]

During those meetings, Wehrli made it clear that if the employees did not participate in the Respondents' plan to operate its business through purported owner-operators outside of its bargaining relationship with the Union, they would be terminated in reverse order of seniority as the trucks were sold. In addition, after the second meeting, when a strike by the Union was in prospect,[47] Wehrli had a hallway conversation with driver Jeff Fowler in which he told Fowler to "think hard" about buying a truck, but added that if Fowler were seen "out on the strike line," then "there would be no job or truck for sale" for him.[48] Thus, in the meetings the employees were threatened with job loss if they

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[46] *Central Management Co.*, 314 NLRB 763, 767 (1994), citing *Medo Photo Supply Corp. v. NLRB*, 321 U.S. 678, 683-684 (1944); *Allied-Signal, Inc.*, 307 NLRB 752 (1992).

[47] As noted in the Statement of Facts, the strike actually commenced on June 17.

[48] Fowler testified to this conversation. When asked if anything "was said to a driver that if they went on strike that you would not sell them a truck," Wehrli testified that he "didn't think" he had said "anything like that." He also said, however, that he could not remember which of the striking drivers he had conversed with, and he did not directly deny the incident to which Fowler testified.

failed to accede to what we have found to be a scheme to continue the operation outside of the current bargaining relationship; and Fowler was threatened with job loss if he participated in the strike. All of these statements amounted to threats in violation of Section 8(a)(1) of the Act.[49]

Finally, during the strike Wehrli approached several drivers on the picket line and advised them to sign "financial core" statements—which the employees reasonably understood to be resignations from the Union, making them "financial core" members—and then cross the picket line. Otherwise, they were told, there would be "no work" for them. NRM had distributed forms outlining procedures for becoming "financial core" members to the employees with the paychecks that covered their work for the period ending with the commencement of the strike. In the context in which this occurred—the Respondent's imminent shift to an operation in which it would be engaging employees' services only outside the collective-bargaining relationship—Wehrli's conduct was

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[49] See, e.g. *Sunnyside Home Care Project*, 308 NLRB 346, 347 (1992) (threat of reprisal for participating in strike); *Fluor Daniel, Inc.*, 311 NLRB 498, 501 (1993) (threat of reprisal for honoring picket line). However, as noted above (fn. 19), we agree with the judge that it was not unlawful to ask the drivers whether they would cross the picket-line in order to work for T & W during the strike, and therefore adopt the judge's dismissal of the separate interrogation allegations. We also deny the General Counsel's exception regarding a statement allegedly made by Robert Wehrli to driver Joe Japuntich earlier in the spring about discontinuation of payments into contractual benefit funds. Wehrli denied making the statement and on other matters the judge credited Wehrli over Japuntich.

not a mere lawful response to employee questions about resignation but amounted to unlawful solicitation of union resignations, in violation of Section 3(a)(1) of the Act.[50]

E. Termination of the Bargaining Unit Employees

The complaint alleged that the Respondents discharged the unit employees and transferred their work to non-unit personnel, in order to eliminate the Union as the unit bargaining representative. The conduct was alleged to violate both Section 8(a)(5) and Section 8(a)(3) of the Act. The complaint also alleged that the Respondents violated Section 8(a)(3) of the Act by refusing to reinstate striking employees when the Union made an unconditional offer to return on their behalf on February 11, 1993. For the following reasons, we find that the record shows that the Respondents engaged in this unlawful conduct.

First, as to the terminations, the legal basis for finding that this conduct violated Section 8(a)(5) is set out in section II-3 above. As to the Section 8(a)(3) allegation, we disagree with the judge's dismissal because we disagree with the premise on which he dismissed the allegation, namely that NRM had discontinued its delivery operations and now dealt only with "independent" contractors who had bought the tricks in bona fide transactions. In our view, the employees were discriminatorily, in violation of Section 8(a)(3), presented with a choice that the Respondents could not lawfully impose upon

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[50] See *Manna Pro Partners*, 304 NLRB 782, 790 (1991) (soliciting employees to sign petition repudiating the union).

them—either accept termination or agree to drive under the unilaterally implemented plan to subcontract delivery work to owner-drivers, outside of the current collective-bargaining relationship.[51] The drivers did not choose to quit working for NRM; they were effectively discharged because the Respondents required them to work under conditions established in denigration of their statutory right to bargain.[52]

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[51] *RCR Sportswear*, 312 NLRB 513, 513-514 and cases there cited (1993) enfd. 37 F.3d 1488 (3d Cir. 1994).

[52] Before the judge, the Respondents contended that the 8(a)(3) discharge allegation was not based on a timely filed charge and therefore was barred by Sec. 10(b) of the Act. We disagree. The very first charge filed by the Union, on June 8, 1992, (Case 13-CA-3031) alleged that NRM had violated Sec. 8(a)(3) and 8(a)(5) by seeking to compel unit employees to become owner-drivers in order to circumvent its contract with the Union. That charge remained under investigation even after the Union filed its July 17, 1992 charge alleging that implementation of the truck sales violated Sec. 8(a)(5). In the terminology of the Seventh Circuit in *NLRB v. Braswell Motor Freight Lines, Inc.*, 486 F.2d 743 746 (7th Cir. 1973), the General Counsel "entered the controversy" on the basis of the charges filed in 1992, and the later charge amendments and complaint allegations elaborating on details and refining theories were logically "a part of that controversy." See also *Facet Enterprises v. NLRB*, supra, 907 F.2d at 978-979 (failure to specify in charge a refusal to supply information did not result in 10(b) bar, since the charge "directed the Regional Director's attention to the rancorous dealings between Facet and the Union in the winter of 1983-84"). In other words, the amended charges were closely related to the original charges regarding the scheme that resulted in the employees' terminations, and it is undisputed that the charges filed in June

(continued...)

The fact that the employees were then on strike does not preclude a finding of unlawful discharge, with entitlement to backpay commencing at that point. When strikers are unlawfully discharged, they are not required to request reinstatement since, by discharging them, the employer has signaled that he does not regard them as strikers entitled to reinstatement upon request.[53]

Even assuming that the unit employees had not been unlawfully discharged when NRM sold the trucks and gave the work to owner-operators, the Respondents would still be in violation of Section 8(a)(3) commencing from February 11, 1993, when, notwithstanding their terminations, the strikers made an unconditional offer to return to work and were denied reinstatement. The same unfair labor practices that undermined the bargaining process and precluded a lawful bargaining impasse also were a cause of the strike, rendering it an unfair labor practice strike from its outset. The employees struck in response to the Respondents' unlawful insistence that they choose between losing their jobs or accepting employment on the drastically changed terms and conditions without continuation of their union representation. It is settled law that unfair labor practice strikers cannot be permanently replaced and must be

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[52] (...continued)
and July of 1992 were timely. *See Pioneer Hotel & Gambling Hall*, 324 NLRB 918 fn. 1 (1997), aff'd, in pert. part 182 F.3d 939 (D.C. Cir. 1999) (stating and applying "closely related" test).

[53] *Abilities and Goodwill*, 241 NLRB 27 (1979), enf. denied on other grounds 612 F.2d 6 (1st Cir. 1979). Accord: *NLRB v. Lyon & Ryan Ford*, 647 F.2d 745, 755-757 (7th Cir. 1981).

reinstated upon their unconditional offer to return.[54] It is undisputed that, through their Union, the strikers made an unconditional offer to return on February 11, 1993, and that the Respondents failed to reinstate them. The Respondents thereby violated Section 8(a)(3) and (1) of the Act.

CONCLUSIONS OF LAW

Naperville Ready Mix, Inc., T&W Trucking, Inc. and Wehrli Equipment Co. are a single employer within the meaning of Section 2(6) and (7) of the Act.

2. General Teamsters, Chauffeurs, Salesdrivers & Helpers Local Union No. 673, affiliated with the International Brotherhood of Teamsters, AFL-CIO is a labor organization within the meaning of Section 2(5) of the Act, and it is the exclusive representative of employees of the Respondent within an appropriate unit.

3. By transferring and/or subcontracting bargaining unit work to owner-drivers without bargaining in good faith to impasse with the Union, by discharging unit employees and replacing them with owner-drivers, by failing and refusing to provide the Union with information it requested concerning the transfer of ownership of trucks formerly driven by unit employees, and by dealing directly with unit employees concerning the continuation of their employment on a non-union basis, the Respondents have violated their obligation to bargain with the Union under Section 8(a)(5) and (1) of the Act.

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[54] *Frontier Hotel and Casino,* 323 NLRB 815 fn. 5 (1997); *National Management Consultants,* 313 NLRB 401 (1993).

4. By threatening unit employees with the loss of their jobs and by encouraging striking employees to abandon their full support for the Union, the Respondents have violated Section 8(a) (1) of the Act.

5. By virtue of the unfair labor practices described above, the strike by unit employees which began on June 17, 1992, was an unfair labor practice strike. By failing and refusing to reinstate unfair labor practice strikers upon their unconditional offer to return to work and by earlier effectively discharging the strikers, the Respondents have violated Section 8(a)(3) and (1) of the Act.

REMEDY

Having found that the Respondents have engaged in certain unfair labor practices within the meaning of Section 8(a)(5), (3), and (1) of the Act, we shall order the Respondents to cease and desist from engaging in such conduct and to take certain steps to effectuate the policies of the Act. We shall order the Respondents to restore unit delivery work to the unit employees, to offer reinstatement to all employees who lost their jobs as a result of the unlawful transfer of the work outside the unit and to all striking employees who the Respondents refused to reinstate upon their unconditional offer to return. In addition we shall order the Respondent to make whole all employees for any loss of earnings and other benefits suffered as a result of the Respondent's unfair labor practices. Backpay is to be computed in the manner set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest to be computed in the manner prescribed in *New Horizons for the Retarded,* 283 NLRB 1173 (1987).

We shall further order the Respondents to provide the Union with all information it requested and to bargain on request with the Union concerning all terms and conditions of employment, and if an understanding is reached, to embody that understanding in a signed agreement.

In view of the nature of the Respondents' operations, in addition to posting notices in all appropriate places at its 1805 High Grove Street facility, we shall require the Respondents to mail each employee who lost his job as a result of its unfair labor practices a copy of the attached notice marked "Appendix."

ORDER

The Respondents, Naperville Ready Mix, Inc., T&W Trucking, Inc., and Wehrli Equipment Co., Naperville, Illinois, a single employer, its officers, agents, successors and assigns, shall

1. Cease and desist from

(a) Unilaterally transferring and/or subcontracting unit.

(b) Dealing directly with unit employees over the terms and conditions of their continued employment.

(c) Discharging unit employees and replacing them with owner-drivers.

(d) Failing and refusing to provide the Union with relevant information it requested concerning the transfer/subcontracting of unit work.

(e) Failing and refusing to reinstate unfair labor practice strikers upon their unconditional offers to return to work.

(f) Threatening employees with job loss and encouraging employee disaffection from the Union.

(g) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Upon request, bargain collectively for a successor agreement with the Union as the exclusive collective bargaining representative of the unit employees, and if an understanding is reached, embody the understanding in a signed agreement. The appropriate unit is:

> All Ready Mix drivers, mechanical batchers, and other yardmen employed by Naperville, excluding all other employees and all supervisors and guards within the meaning of the Act.

(b) Provide the Union with all relevant requested information concerning its decision to subcontract and/or transfer unit delivery work outside the unit.

(c) Within 14 days from the date of this Order restore the unit delivery work to the unit employees and offer full reinstatement to all unit members who lost their jobs as a consequence of the unilateral subcontracting and/or transferring of unit delivery work to owner-drivers without prejudice to the unit members' seniority or any other rights or privileges previously enjoyed.

(d) Without 14 days of this Order, offer full reinstatement to the unfair labor practice strikers that the Respondent unlawfully refused to reinstate, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(e) Make whole, with interest, all terminated employees and unfair labor practice strikers who offered unconditionally to return, for any loss of earnings and other benefits they may have suffered as a result of the Respondent's unfair labor practices, in the manner set forth in the Remedy section of this decision.

(f) Preserve, and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(g) Within 14 days after service by the Region post at their 1805 High Grove Street, Naperville, Illinois facility, copies of the attached notice marked "Appendix."[55] Copies of the notice on forms provided by the Regional Director for Region 13, after being signed by the Respondent's authorized representative shall be posted by the Respondents immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondents to ensure that the notices are not altered, defaced, or covered by any other material. In the event that during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in

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[55] If this Order is enforced by a judgment of a United States court of appeals, the words to the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of a United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

these proceedings, the Respondent shall mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since May 1992.

(h) Mail to the unit employees who lost their jobs as a result of the unlawful transfer of unit work outside the unit, copies of the attached notice marked "Appendix."

(i) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. September 21, 1999

John C. Truesdale, Chairman

Sarah M. Fox, Member

Wilma B. Liebman, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT fail and refuse to bargain with the Union, General Teamsters, Chauffeurs. Salesdrivers and Helpers Local Union No. 673, a/w the International Brotherhood of Teamsters, AFL-CIO, as the exclusive bargaining representative of our employees in the unit described below, by unilaterally transferring and/or subcontracting unit work outside the bargaining unit.

WE WILL NOT refuse to bargain with the Union by failing to provide the Union with requested information relating to the transfer and/a subcontracting of unit work.

WE WILL NOT refuse to bargain with the Union by dealing directly with unit employees regarding their terms and conditions of continued employment.

WE WILL NOT discharge unit employees and replace them with owner-drivers.

WE WILL NOT fail and refuse to reinstate unfair labor practice strikers to their jobs upon their unconditional offers to return to work.

WE WILL NOT threaten employees with loss of jobs and WE WILL NOT make statements to employees designed to encourage disaffection from the Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the bargaining unit:

> All Ready Mix drivers, mechanical batchers, and other yardmen employed by Naperville, excluding all other employees and guards within the meaning of the Act.

WE WILL provide the Union with all requested information concerning the decision whether to transfer and/or subcontract unit work outside the unit.

WE WILL within 14 days from the date of the Board's Order restore the unit delivery work to the unit employees and offer full reinstatement to all unit members who were discharged as a consequence of the unilateral subcontracting and/or transferring of unit delivery work to owner-drivers, without prejudice to the unit members' seniority or any other rights or privileges previously enjoyed.

WE WILL, within 14 days of the Board's Order, offer full reinstatement to the unfair labor practice strikers that we unlawfully refused to reinstate, without prejudice to their seniority or any other right or privileges previously enjoyed.

WE WILL make whole, with interest all terminated employees and unfair labor practice strikers who offered unconditionally to return to work, for any loss of earnings and other benefits they may have suffered as a result of our unfair labor practices.

[Dated October 13, 1995]

JD–181–95
Naperville, IL

UNITED STATES OF AMERICA
BEFORE THE NATIONAL
LABOR RELATIONS BOARD
DIVISION OF JUDGES

NAPERVILLE READY MIX, INC.; T & W TRUCKING, INC.; WEHRLI EQUIPMENT CO.; DIAMOND READY MIX, INC.; FOX VALLEY READY MIX, INC.; CONCRETE 1, INC.; CONCRETE 2, INC.; CONCRETE 3, INC.; CONCRETE 4, INC.

Case 13–CA–31031
13–CA–31059
and 13–CA–31061
13–CA–31097

GENERAL TEAMSTERS, CHAUFFEURS, SALESDRIVERS & HELPERS LOCAL UNION NO. 673, affiliated with the INTERNATIONAL BROTHERHOOD OF TEAMSTERS, AFL-CIO

Sheryl Steinberg, Esq., for the General Counsel.
John J. Toomey, Esq. (Arnold and Kadjan), . . . for the Charging Union.
Steven H. Adelman, Esq. (Lord, Bissell & Brook), for Respondents.

DECISION

Statement of the Case

ROBERT T. WALLACE, Administrative Law Judge. This case was tried in Chicago, Illinois over an 8 day

period extending from June 27 through July 13, 1994. The original charge was filed on June 8, 1992[1] and the original consolidated complaint issued on February 26, 1993.

At issue is whether Respondents transferred trucking operations to owner-operators, refused to provide information concerning the transfer and dealt directly with employees in violation of collective bargaining obligations under Section 8(a)(5) of the National Labor Relations Act, discriminatorily discharged and refused to reinstate employees in violation of Section 8(a)(3) and, through threats, interrogations and other coercive conduct, engaged in independent violation of Section 8(a)(1).

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Respondents, I make the following

Findings of Fact

I. Background

Naperville Ready Mix, Inc. (Naperville) produces and sells concrete, primarily for residential construction. Its facilities are located at 1805 High Grove Street in Naperville, Illinois and include an office building, a shop for mechanical work, a batch plant and a storage facility. Richard Wehrli and his wife are sole stockholders and President and Secretary, respectively. They are also on the Board of Directors, along with Richard's brother-in-law Jerry Doll and (until June 30) his son Robert.

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[1] All dates are in 1992 unless otherwise indicated.

Naperville's truck drivers were covered by a collective bargaining agreement with the Charging Union (Union)[2] since 1960. The most recent agreement expired on April 30.

T & W Trucking, Inc. (T&W) is owned by Wehrli and Robert Tilly, each holding a 50% stock interest. It has been in business since 1987 hauling bulk cement gravel, stone, precast concrete and roof tile. It serves a number of companies, including Naperville, Prairie Material Services (Prairie), Dixon Marquette Company (Dixon), Lifetime Roof Tile (LRT) and Dukane Precast (Dukane). Wehrli has a financial interest in the latter two companies, but not in Prairie or Dixon. Its employees are not represented by any union. Tilly is president and runs the company on a day-to-day basis. Its office is in his home where all records are maintained. He spends about 10 to 15 minutes a day dispatching T&W trucks and in most instances the trucks are stationed at the Grove Street complex.

Wehrli Equipment Co., Inc. (Equipment) is wholly owned by Wehrli. It repairs and reconstructs dump trucks for Naperville and others at Grove Street. Also located there are other Wehrli affiliated companies, including Dukane, Naperville Excavating (Excavating), Mustang Construction (Mustang) arid Easy Street Construction (Easy).[3] Tilly became full time maintenance supervisor for Equipment on or shortly after June 30, a position he had previously held at Naperville.

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[2] Respondents admit, and I find, that the Union is a labor organization within the meaning of Section 2(5).

[3] It is also admitted, and I find, that Naperville, T&W and Equipment are employers engaged in commerce within the meaning of Section 2(2), (6) and (7).

Illustrative of the interrelation of the affiliated companies is their involvement in the building of the batch plant at the Naperville facility in 1990. Employees of Equipment performed the initial construction aided by employees of Naperville, Mustang, Dukane and Easy. Ray Brown, a mechanic for Naperville, and Tilly worked on it for about a year and a half together with Dukane's Larry Fromelius. When there was need for erection of panels, Fromelius would oversee the work, but if electrical work was required Norb of Mustang was in charge, and if hooking up generator pipe was required then Brown, aided by Tilly, oversaw the work. During winter months, Brown was also assisted by Easy mechanic to help with construction tasks. This was in addition to Brown's responsibility for operations at Naperville's mechanical shop. Indeed, mechanics would go from the shop to the batch plant and back to get instructions. On becoming operational, the batch plant, though technically under Equipment, was run by Naperville employees Brown and Tilly. All this occurred without any allocation of hours and wages between the companies.

Most Wehrli affiliated companies are covered under a health insurance policy maintained by Dukane and by workmen's compensation and vehicle liability policies held by Equipment.

II. Bargaining

A. History

Wehrli's first represented Naperville in labor contract negotiations with the Union in the early 1960's as a member of the Northern Illinois Ready Mix Association (NIRMA). Naperville left that association in 1986 be-

cause Wehrli felt that organization did not properly represent residential (as opposed to commercial) contractors. He then negotiated with the Union for Naperville as part of a group of independent companies called the Western Border Group (WBG). In 1989, Wehrli severed ties to that group and successfully negotiated a three-year contract, extending to April 30, 1992, directly with the Union. That agreement included a 36-month period before new hires reached the contract rate, a concession that neither NIRMA nor WBG had obtained.

B. Pre Strike Negotiations

By letter dated January 27, Naperville notified the Union that it was terminating its contract as of the expiration date and was willing to meet and negotiate a new contract at mutually agreeable times.

The first negotiating session occurred on April 21. The Union was represented by its Secretary-Treasurer Tom Custer and business agent Ron Smith; and Wehrli, his son Robert, and Doll were present for Naperville.

At the start of the meeting, there was some discussion between the son and the Union regarding delays in payment of health and welfare claims. Wehrli mentioned having a similar problem. There was a general discussion about the rising cost of health benefits and how the increases were too expensive. Wehrli explained that the ready mix concrete industry had been very competitive the last 3 to 4 years, and Naperville had not been able to get any increase in its prices for concrete. Nevertheless, there had been wage and benefit increases during that time. He complained that the situation was costing Naperville money, and opined that the company could not continue to operate that way. He proposed that they receive some type of concession for one year to see if

things would get back on an even keel, adding that after the one-year period they could sit down and negotiate an increase in wages and benefits. He observed that if the Union lacked flexibility, the company had three choices. First, it could go out of the ready mix business. Second, it could park the trucks for 1-3 years until the economy turned around and ready mix concrete prices got up to where they should be. Third, it could sell the trucks to the drivers or others and lease them back.

For its part, the Union sought an hourly wage increase of $1.00 per hour, a reduction from 36 months to 12 months in the period of time before new hires reached the contract rate, an increase in pension benefits, and deletion of concessions Naperville had obtained with respect to health and welfare and pension contributions for new hires. One of the proposed language changes was to conform Article 17 ("Work Preservation and Protection of Standards") to Article 17 of the NIRMA Agreement. Naperville rejected the Union's proposal. The Union asked for a counter proposal, and Wehrli offered a one-year rollover, except Naperville would undertake to provide health & welfare coverage commensurate to the Union's plan and would contribute to the employees' 401(k) accounts the same amount it had been paying to the Union pension plan. Wehrli also requested a change in who would provide health & welfare and pension coverage because, in his opinion, the Trustees were not doing a good job of keeping the costs down. At the Union's request he reduced his proposal to writing.

As noted, the contract had an expiration date of April 30.

The next meeting was held on May 7 with the same persons present except that Union President Al Scholtens substituted for Smith. Custer wanted to go through the Union proposal item by item. Wehrli ignored the re-

quest and accused him of regressive bargaining in trying to get Naperville to sign the same contract the Union expected to have with NIRMA and WBG. Wehrli reiterated his view that Naperville could not compete in the residential market under those terms, and again offered a one-year rollover with respect to wages with Naperville providing its own health insurance and pension plans.

Getting no encouragement, Wehrli told them he wanted to sell his trucks to drivers because he was losing money in the delivery business and would like to operate like "Elmhurst Chicago Stone" (Elmhurst), a construction company whose deliveries reportedly were accomplished by owner-operators paid by yards hauled rather than hourly wages. Custer responded that in order to do that Naperville, like Elmhurst, would have to be party to the NIRMA Agreement. However, although requested, he did not then or ever provide a document governing relations between the Union and Elmhurst. Reluctant to pursue the matter, Custer told Wehrli that he was not going to help him sell the trucks to drivers.[4]

Persistent, Wehrli asked if the Union would sign contracts with owner-operators hauling cement moving from Naperville's facility. Custer replied "No," and then Scholtens added (according to Custer) that if Naperville tried to use owner-operators, the Union would strike every one of his fucking companies." When Wehrli pointed out that two of those companies (Excavating and Dukane) had contracts with the Union that did not expire until January 31, 1993, Scholtens told him he could take those contracts and "stick them up your ass."

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[4] Custer states that at this time he was not "real clear on whether or not he [Wehrli] was actually going to pursue the area of selling his trucks" because he had raised that possibility three years' earlier as a bargaining tool.

On May 12 Wehrli faxed a letter to Custer reading as follows:

> I have decided to go out of the trucking business and am offering to sell my trucks to my present drivers first, and then any leftover trucks will be offered to outsiders.
>
> I intend to use individual contractors for all my trucking needs.
>
> If you want any discussion with me in this regard feel free to call.

The Union made no written response. In Custer's view the letter, as well as Wehrli's continued repetition of intent to sell the trucks "was just a negotiating tool that he was using to try to get a better agreement than everybody else in the industry."

The third meeting was on May 14 with the same participants as at the first, and it lasted about an hour. Some movement occurred. The Union withdrew a number of items from its proposal; and Naperville agreed to the Union's request for language changes in three clauses. Wehrli restated his desire to sell the trucks and proposed a one-year rollover coupled with deletion of Article 24 that he viewed as an obstacle to the sale.[5] Custer again responded that he was not going to help in achieving that objective and would not consider any change in Article 24.

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[5] Article 24 provides, among other things, that owner-operators who are not certified by the Illinois Commerce Authority (ICA) are considered employees of Naperville for virtually all purposes, including payment of wages, union security, and health/welfare and pension benefits.

Naperville faxed a copy of Wehrli's "rollover-minus-Article 24" proposal to the Union on the following day stating that it rejected prior Union proposals. At a Union meeting held shortly thereafter, Custer told the membership of that development and briefed them on other pending negotiations with ready mix contractors in the "Chicagoland" area. In a vote taken that evening, the members rejected Naperville's proposal and authorized a strike.

Wehrli held two meetings with Naperville drivers between May 20-27[6] where, after stating that Naperville was going to sell its cement mixer trucks (approximately 25) and get out of the trucking business, he gave them first option to buy vehicles but urged quick action because he wanted to sell all of the units by July 1.[7] He told them they could continue to haul cement for the company if they opted to buy trucks and operate as independent contractors. He proposed a $14.00 per yard haulage fee and gave them a rough estimate of truck prices and how much they could expect to earn in one year after expenses; and he promised to help them with matters such as financing, licenses, title transfers and insurance. He also stated that all drivers who did not buy would be terminated by July 1, based on reverse

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[6] Although Wehrli was "not certain" whether he notified the Union about the meetings, I infer it had contemporaneous knowledge because at least 25 of its driver members attended. The situation is analogous to the "small plant rule" cited in *Health Care Logistics,* 273 NLRB 822 (1984).

[7] The July 1 date was significant to Wehrli because Naperville would save approximately $40,000 in license renewal fees. Fees for individual trucks varied from $1,500 to $1,700 and were non-refundable.

seniority, as trucks were sold to outsiders who chose to haul for the company as owner-operators.[8]

Shortly after May 27 Wehrli met with two Naperville mechanics, at least one of whom was a member of the Union. They had heard through the grapevine that the trucks were being offered for sale. Wehrli said he wanted them to continue servicing vehicles hauling cement for Naperville but proposed they do so by going into business for themselves. He gave assurance that he would not let them be "screwed" by vehicle owners even if that meant paying repair bills himself. He concluded by saying he expected them to maintain the trucks in any event.

Only two Naperville employees agreed to purchase trucks, Wehrli's son Robert and one driver, Richard Downs. So beginning on June 1 advertisements were placed in local newspapers under the heading "Business Opportunities," as follows:

> **CONCRETE MIXER TRUCK DRIVERS** – OWN YOUR OWN TRUCK. FINANCING AVAILABLE. NET $40,000 - $80,000 PER YEAR, PLUS BUILD EQUITY IN YOUR OWN TRUCK! WELL ESTABLISHED THIRTY-THREE YEAR OLD COMPANY WITH EXCELLENT CUSTOMER BASE. CALL JERRY AT (708) 355-4777.

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[8] Often drivers who attended the meetings and testified, one (Joe Japuntich) understood Wehrli to say that vehicle buyers could work only for him, and "would have to use his mechanics [and] . . . buy all the parts and things through him, insurance, fuel and such to operate the vehicles." One other (Jeff Fowler) states he heard Wehrli say (. . . we shouldn't be handing [reporting] any of this to the Union." In light of Wehrli's denials and lack of corroboration I decline to credit these accounts.

Wehrli's son-in-law Jerry Doll received 50 inquiries. After checking credit references he considered 10 to be potential purchasers.

On June 1, Custer called Wehrli and arranged for a meeting on June 9. During that call Wehrli brought up the matter of truck sales. Custer cut off any discussion by categorically stating it could not be done.[9] He maintained that position when he met with Wehrli and his son on June 9.[10] Custer briefed them on terms of a collective bargaining agreement between the Union and NIRMA reached two days earlier. Nothing further was accomplished.

The next meeting was on June 15. This time a federal mediator was present. Custer and Smith represented the Union and Wehrli and Doll were present on behalf of Naperville. The meeting lasted about an hour and a half with the mediator going back and forth between the two parties. The Union made some minor modifications to its proposal. In response, Naperville made a new "final" offer of a one-year rollover minus Article 24 plus a wage and benefit increase of 65 cents an hour spread in the same was as in the NIRMA Agreement

At a Union meeting that evening members voted unanimously to reject Naperville's offer and again authorized a strike. The strike began on Wednesday, June 17.

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[9] As noted, the Union filed its original charge on June 8. Therein Naperville is alleged to have dealt directly with unit members to compel them to become owner-operators.

[10] During the meeting Robert Wehrli told Custer he was planning to buy some of the Naperville trucks and asked whether he could sign a contract with the Union. Custer's answer was an emphatic "No."

C. Post Strike Negotiations

Another meeting was held on Sunday, June 21 at the office of the mediator. It lasted about 15 minutes. No progress was made. The same result obtained at a 15-minute meeting called by Custer on June 22. In a letter to Custer dated June 24, Wehrli declared an impasse and an intent to implement Naperville's final offer on June 29. This elicited a Union expression of willingness to continue bargaining, and a brief session occurred on June 25. The only new proposal was offered by Naperville. It amended its last offer by agreeing to pay the NIRMA negotiated increases for an additional six-month period, including 60 cents more per hour during that period. The offer remained unacceptable to the Union.

At the Union's request the parties met, again briefly, on July 1 for what turned out to be the last formal session. Instead of seeking an increase of $1.00 an hour for each year of a three-year contract, the Union asked for 75 cents.[11] Custer also stated that he was open to some modification of Article 24, adding "but I would not delete it." The meeting ended after Wehrli stated his amended offer of June 25 was a final one.

Immediately after the meeting Custer sent a letter to Naperville requesting information concerning the sale of trucks and suggesting negotiations be scheduled after the Union had opportunity to review the information; and by letter dated July 2 the Union's attorney asked it to provide "all information relating to the sale, transfer, lease or purchase of ready mix trucks from Naperville Ready Mix to its former employees, independent contractors or owner operators and he specified what documents

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[11] The 75 cent raise was substantially higher than the agreement just reached with NIRMA and WBG. No explanation was given for the disparity.

were desired, including purchase contracts, financing agreements, leases and maintenance and repair arrangements. He added that a refusal to bargain charge would be filed in the event the data was not made available within five working days.

Naperville replied to the requests in a letter from its attorney dated July 10. That letter reads in part as follows:

> Naperville . . . has the right to take whatever steps it deems necessary to continue operations in the face of the strike – including selling vehicles to persons to whom the Company can subcontract its work. The Union has no right to know the financial arrangements between Naperville . . . and its subcontractors. We fail to see how the documents you have requested are reasonably related to the Union's duty to fairly represent its members.
>
> If you can furnish us with an explanation as to how each of the documents requested is reasonably calculated to elicit information that the Union may need to properly represent its members and a citation to case authority which supports the request, I am sure that Naperville . . . will be responsive to your letter.

The Union did not respond. Instead it filed another charge on July 19 alleging, among other things, unlawful failure to provide requested information about the "sale." None of the data was made available except to the extent entered the record of this proceeding.

At the Union's request Wehrli again met with Custer on two occasions. The first was at the Union hall in late July and lasted about three minutes. In response to Custer's inquiry as to whether there was some way to resolve their differences, Wehrli answered that it was

too late because the trucks were sold. But he again asked to see a contract under which (he believed) Elmhurst was allowed to use owner-operators. As before, Custer claimed, without producing a document, that Elmhurst was signatory to the NIRMA contract. The second was on August 7 at a restaurant in Naperville. It lasted about five minutes. Custer presented a handwritten six-point proposal, as follows:

> 1. Company will not be responsible for wages, health & welfare benefits or pensions of owner operators or their employees.
>
> 2. Naperville will sign a collective bargaining agreement covering the plant operator and yard men [individuals not covered under the expired agreement].
>
> 3. Company agrees that all owner-operators and their employees will be signatory to the NIRMA Agreement.
>
> 4. Drivers for T&W [who refused to cross the picket line] return to work [but now] under a [collective bargaining agreement] agreement.
>
> 5. All charges . . . dropped on both sides (Global Agreement) except for the fines for members[12] who crossed the picket lines [and these] could be reduced to maintain membership in good standing.
>
> 6. All employees who lost their jobs will receive a severance pay of $5,000 . . . in addition to all vacation pay earned.

After glancing at the document, Wehrli said he would agree to the first item but invited Custer "to shove the rest up your ass." Indicative of Wehrli's mood was his

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[12] Members included the Wehrlis (father and son), Doll and Tilly.

parting accusation that Custer was at fault for his nephew being hurt.

In a fax dated August 18, Naperville told the Union it was going to sell its remaining vehicles and cease doing any deliveries on its own; and to achieve that objective it added to its proposal of June 25 a requirement for elimination of Article 17 (as well as Article 24) of the old contract.[13] The missive concluded by stating:

> As you know, we believe we are at an impasse on the issue of our plan to subcontract all delivery work. Of course we are still willing to bargain with you on the issue of subcontracting. However, we believe it would be more fruitful to begin bargaining over the effects of subcontracting.
>
> If you are interested in further negotiations, please call me to schedule a meeting.

The Union did not respond. No further negotiations took place. In early February, 1993, the Union on behalf of named strikers mailed to Naperville an unconditional offer to return to work. None have been recalled.

D. Conclusions

It is well established that an employer's *decision* to go out of business is an exercise of managerial discretion not subject to any bargaining obligation under Section 8 of the Act. *Textile Workers v. Darlington Co.*, 380 U.S. 263 (1965), *Otis Elevator Co.*, 269 NLRB 891 (1984); and there is no claim in the instant case that Naperville had

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[13] Article 17 requires use of Naperville drivers before any subcontracting can take place while, as noted in footnote 5, Article 24 requires the company to treat owner-drivers as employees.

to bargain about a decision to discontinue trucking operations.

An employer, however, must provide an opportunity to bargain over the *effects* of cessation on employees in a bargaining unit. *Merryweather Optical Co.*, 240 NLRB 1213 (1979); and effect's bargaining must be conducted "in a meaningful manner at a meaningful time." *First National Maintenance Corp. v. NLRB,* 452 U.S. 666 (1981). To achieve that result a union on being advised of the situation must make a timely request for effect's bargaining. *Ventura County Star-Free Press,* 279 NLRB 412, 420 (1986). Otherwise, it is deemed to have waived its right. *Associated Milk Producers,* 300 NLRB 561, 563 (1990); *WPIX Inc.*, 299 NLRB 525, 526-27 (1990); *Print-Quic,* 262 NLRB 857, 861 (1982).

Faced with competitive pressures in its ready-mix business, Naperville's president Wehrli as early as May 7 put the Union on notice that absent contract concessions it intended to discontinue trucking operations; and it confirmed that decision, and solicited discussion of it, in a written communication sent to the Union on May 12. When the Union repeatedly declined to discuss the matter and offered no significant bargaining concessions, Wehrli on two occasions between May 20 and 27 offered Naperville drivers first opportunity to buy vehicles, telling them the company's truck operations would cease as of July 1. As found above (footnote 6), the Union had contemporaneous knowledge of those meetings. On June 1, the day Naperville advertised for buyers in local newspapers, the Union again rejected an opportunity for effects bargaining; and, on June 15 it rejected Naperville's latest contract proposals and authorized the strike which began on June 17.

In these circumstances, and assuming for the moment that Naperville ceased its own trucking operations on

July 1, I find that by repeatedly rejecting its requests for effects bargaining, the Union waived its rights in that regard. Accordingly, its demands on July 1 and 2 for data concerning truck sales came too late to create any obligation on Naperville's part.

Also, I find that Wehrli's meetings with drivers in May did not involve direct dealing with union members on matters involving terms and conditions of employment. Rather he appears to have used those meetings solely for the purpose of giving them first opportunity to buy vehicles. His proposals to sell assets to them were financial and managerial in nature and not of a type giving rise to a duty to bargain. *Shell Ray Mining,* 286 NLRB 466, 468 (1987), citing *General Motors Corp.,* 191 NLRB 951 (1971), enf'd. *sub nom. Auto Workers v. NLRB,* 470 F.2d 422 (D.C. Cir. 1972); *National Car Rental Systems,* 252 NLRB 159 (1980).

The basic question, therefore, is whether there was a *bona fide* sale or a sham transaction.

III. Truck Transfers/Subcontracting

During the last week of June, and while the strike continued, Wehrli entered into "handshake agreements" to sell trucks to the two Naperville employees (his son Robert and driver Richard Downs), a driver for T&W (Steve Weissinger), and two individuals (Tate Haley and Michael Drane) who responded to ads and had no prior connection with Wehrli affiliated companies. R. Wehrli, Downs Weissinger and Drane each chose two mixer trucks, while Haley chose one.

There was little or no negotiations. Wehrli set vehicle prices, required no down payments and agreed to pay $14.00 for each cubic yard of Naperville ready-mix hauled, of which $1.00 would go to payment of principal.

Interest on unpaid balances would be at the prime rate set from time to time by a named Chicago bank. Naperville would retain a security interest in the vehicles and have first priority on their use.

Titles of the vehicles were transferred during the period June 28-30 from Naperville to six corporations: Respondents Diamond Ready Mix, Inc. (Diamond), Fox Valley Ready Mix, Inc. (Fox Valley), and Concrete 1 through 4. Fox Valley was a preexisting corporate shell owned by Weissinger and the remaining 4 companies were incorporated on June 19 by Wehrli. His son acquired the stock of Diamond on June 22; and the stock of Concrete 1, 2 and 3 was transferred on July 10, with Downs acquiring that of C1, Drane that of C2, and Haley that of C3.

Pursuant to the handshake agreements and in anticipation of documentation which occurred on July 10,[14] the new "owners" began operations for Naperville on July 1,[15] having themselves paid license fees approximating $1600 per vehicle and leased their vehicles to T&W, a motor carrier with appropriate authority from the Illi-

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[14] The transfer documents also contain numerous provisions which protect the seller, for example: stock remains in escrow until debts are paid; buyers must maintain a net worth equal to unpaid principal; seller has access to books and records for tax and copying purposes; proceeds from vehicle insurance must be used to secure unpaid principal; seller has security interest in property acquired or used in buyers operations; and a number of buyer default clauses making the entire principal due if the precipitating event is not cured within 15 days.

[15] There is no evidence that Naperville as a corporate entity provided any transportation for itself after July 1.

nois Commerce Commission.[16] The stock of C4, a company with title to one former Naperville mixer truck, was transferred on August 24 to Brad Bonnell under the same terms described above. Bonnell, like Weissinger, was a full-time driver for T&W. C4 began operations immediately, Bonnell having paid the vehicle license fee and signed a lease with T&W.

The new "owner-operators" were given loading slips and were dispatched from the Naperville facility by employees of Equipment; and, when not in use, their mixer vehicles were parked there without charge. In most instances they opted to purchase fuel from and have heavy maintenance performed by Equipment. Similarly, they chose to pay for insurance under policies covering Wehrli affiliates and maintained in the name of affiliates Dukane (health)[17] and Excavating (liability, property loss and workers' compensation). Also, and as a condition for continued participation in the group liability policy and to be in compliance with governmental regulations, lessors (and their drivers) were required to observe safe operation rules, attend monthly vehicle safety meetings (conducted by a consultant employed by Naperville, Bill Warden) and to submit to random tests for drug use. The tests were taken at a facility used by Wehrli affiliates and owner operators reimbursed Naperville for costs.

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[16] The lessors paid no fee to T&W for operating under the latter's authority. Its president (Tilly) views the arrangement as advantageous to T & W because, absent outbound movements of ready-mix, Naperville would have no need for T&W's inbound hauling of raw materials.

[17] As owner and sole employee of C3, Haley opted not to participate in the medical insurance program; and Robert Wehrli went beyond the Dukane medical policy and provided dental insurance for employees of Diamond.

By October it became apparent to all concerned that the strike significantly diminished expected revenues of owner-operators. To alleviate their situation, Wehrli accorded to Fox Valley and the "Concretes" a waiver of interest payments and reduced the $1.00 per ton principal payment to $.50 until January, 1993 and, as to his son's company (Diamond), sharply reduced the price of previously purchased vehicles.[18]

During a 23-month period extending from early July 1992 through May 1994:

> Diamond acquired a fleet of 10 vehicles at a cost of $151,763 for which it Wehrli held no position with Wehrli affiliated companies. He hired eight drivers only one of which (Robert Carlson) previously worked for Wehrli affiliated companies. He drives a vehicle himself, performs minor vehicle maintenance at the Naperville facility using his own tools, and pays mechanics employed by Equipment for major repairs. Books and records are maintained by his wife and reviewed by an accountant of his own choosing. He acquired membership in the Illinois Transportation Association and has an application for operating authority pending with the Illinois Commerce Commission (ICC), a grant of which would enable Diamond to haul for various shippers without leasing to other truckers.

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[18] These changes were incorporated into document 3 otherwise identical to the original transfer papers. They were signed around mid-January, 1993 but back-dated to July 10. The revised documents were received in evidence, the originals having been lost or destroyed. I find no subterfuge or intent to deceive. Indeed, the originals were made available to Board agents during the pre-complaint investigation.

Fox Valley expanded from 2 to 5 vehicles the total cost of which was $171,000. Principal and interest payments amounted to $46, 210 and $11,219, respectively. Trucks are driven by owner Weissinger and 3 driver employees. Weissinger performs minor maintenance using his own tools, often at a 35' x 72' garage near his residence. He reimburses Equipment for major repairs. His wife serves as bookkeeper, aided by an accountant having no connection with Wehrli affiliated companies. He shifted his employees' health insurance from the Dukane policy to an insurer of his own choosing sometime in January, 1993; an he has an application on file with the ICC for an operating permit

Concrete 1 acquired 5 trucks for a cost of $178,000, paying $27,217 in 25 principal and $11,202 in interest thereon. Owner Downs renamed the company as "dba R&J Ready Mix" in July. He performs light maintenance and pays Equipment to do heavier repair work, although on one occasion, he had a mixer unit rebuilt by a an individual who had previously worked for a Wehrli affiliated company. He has several driver employees and also drives vehicle himself. Books and records are maintained by his brother, an accountant. He has an application for a trucking permit pending before the ICC.

Concrete 2 bought 3 vehicles costing a total of $144,000 for which it paid $27,810 in principal and $10,223 in interest. Owner Drane renamed the company as "dba KLM Cartage." He does his own bookkeeping, drives a vehicle and has at least one other employee driver. He has used Equipment for repairs as well as two other services "Cameron" and "MRW." He is seeking a permit from the ICC.

Concrete 3 continued to operate with one mixer truck purchased for $61,000; and it made principal

payments amounting to $7,475 with interest totaling $3,333. Owner Haley drove the vehicle, did minor maintenance and on the few occasions requiring heavier mechanical work, Equipment mechanics were used. Records were overseen by an accountant not connected with Wehrli affiliates. The mixer truck was sold back to Naperville on March 3, 1994 for an amount ($52,526) representing unpaid principal plus accrued interest.[19]

Concrete 4 (dba B&M Ready Mix) also operated with one mixer truck. It cost $41,000. Principal payments were $6,200, interest was $3,145. The vehicle was driven by a driver employee, while owner Bonnell continued to work full-time hauling dry bulk cement for Naperville and Dukane as a driver for T&W. Bonnell performed routine maintenance, using Equipment as well as a company (Superior Diesel) not connected with Wehrli interests. He hired an accounting service to maintain books and records.

I am not persuaded that the equipment transfers were sham transactions and that the operations of the transferees were those of Napervillle-Wehrli, as alleged. Title to the vehicles appears properly to have been conveyed:, and the security provisions (footnote 14) are appropriate and usual in transactions of this type. The buyers were knowledgeable about the mechanical condition and market price of the trucks they bought; and the record amply demonstrates that they assumed the burdens of ownership. They paid substantial amounts for licenses, insurance and principal and interest on their outstanding loan balances. Most hired employee drivers, paid their wages and provided medical benefits; and all assumed

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[19] About one month later Naperville conveyed the vehicle to Diamond for $26,000.

responsibility and paid for required vehicle maintenance. See *Central Transport,* 299 NLRB 5 (1990); *Associated General Contractors,* 290 NLRB 522 (1988), enf'd 899 F.2d 1238 (D.C. Cir. 1990).

The circumstance that they obtained liability insurance (with correlative safety instruction and checkups), medical and disability coverages, fuel, parts and repair services from Wehrli affiliates, does not belie their exercise of ownership and control. Their claim of having paid for those services (buttressed by books and records made available during trial) was not disputed; and they are shown to have been free to (and at times did) use alternative sources unconnected with Wehrli affiliates. I regard their use, without charge, of parking and document reproduction machines and the temporary abatement of principal and interest payments as a matter of mutual convenience and, at best *de minimus.* Similarly, I view Wehrli's decision to reduce the purchase price of some vehicles sold to his son's company (including one repurchased from Haley) simply as an act of generosity having no bearing whatever on the matter of ownership and control.

IV. Alleged Violations of Section 8(a)(1)

On a number of occasions, Wehrli and his son admittedly Robert told Naperville drivers that Naperville would discontinue trucking operations after July 1 and that they would be out of jobs on that date unless they opted to buy vehicles and become independent owner-operators. The claim that those statements constituted unlawful threats intended to discourage support for the Union derives from a perception of sham truck sales designed to disguise continued operations by Naperville. Having rejected that claim, I find the conversations

simply apprised the drivers of Naperville's intent to go out of the trucking business and of an opportunity for them to enter.

Also alleged as unlawful interrogation are inquiries of Kevin Hamblen and other drivers for non-union T&W as to whether they would drive across the picket line to deliver and receive product at the Naperville facility. When they said no Wehrli and Tilly told them they had to do so to continue as T&W drivers. That statement is claimed to constitute an unlawful inducement to cross a picket line. Here too I find no violation. Since virtually all of T&W's trucking operations involve hauling to and from the Naperville facility, the inquiry was proper. *Masher Steel Company*, 220 NLRB 336 (1975), enf'd 532 F.2d 1374 (5th Cir. 1976). And the comment was not coercive. It merely reflected the fact that T&W had no work available for a driver who would not cross the picket line.

Shortly after the strike began, Wehrli approached a group of strikers, gave them an opportunity to haul ready-mix as owner operators and offered advice that by signing a financial core document they could avert union penalties for crossing the picket line. The latter comment is cited as an unlawful solicitation to resign from the Union. It is well-settled that union members may seek financial core membership to absolve themselves from union discipline for crossing a picket line. *Pattern Makers v. NLRB*, 473 U.S. 95, 106 n. 16 (1985); *Tacoma Boatbuilding*, 277 NLRB 513 (1985); *Gordon Construction*, 277 NLRB 530 (1985). That being the case, and absent any indication that the advice was given in an otherwise coercive context, I find no unlawfulness.

Conclusions of Law

For the reasons stated above, I conclude that the evidence fails to establish any violation of the Act.

Disposition

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[20]

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[20] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ORDER

The complaints are dismissed.

Dated, Washington, D.C. October 13, 1995

/s/ Robert T. Wallace
Robert T. Wallace
Administrative Law Judge

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

May 17, 2001

Before

Hon. DANIEL A. MANION, *Circuit Judge*
Hon. ILANA DIAMOND ROVNER, *Circuit Judge*
Hon. DIANE P. WOOD, *Circuit Judge*

Nos. 99-3634 & 99-3994

NAPERVILLE READY MIX, INC., *et al.*,

Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent,

and

TEAMSTERS LOCAL 673,

Intervening Respondent.

On Petition for Review and Cross-Application
for Enforcement of an Order
of the National Labor Relations Board

ORDER

On consideration of the petition for rehearing and rehearing *en banc* filed by counsel for the petitioners on

April 18, 2001, all members of the original panel voted to DENY the petition for rehearing. No judge in regular active service requested a vote on the petition for rehearing *en banc*.

Accordingly, the petition for rehearing is hereby DENIED.

STATUTES INVOLVED IN THIS CASE

29 U.S.C. §157 provides, in pertinent part:

> §157. Right of employees as to organization, collective bargaining, etc.
>
> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection[.]

29 U.S.C. §158 provides, in pertinent part:

> § 158. Unfair labor practices
>
> (a) Unfair labor practices by employers
>
> It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;
>
> . . .
>
> (3) by discrimination in regard to hire or tenure of employment or any term of condition of employment to encourage or discourage membership in any labor organization[;]
>
> . . .
>
> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.
>
> . . .

(d) Obligation to bargain collectively

For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or required the making of a concession[.]

5 U.S.C. §706 provides:

§706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privileged, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.



FILED
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No. 01-280

In the Supreme Court of the United States

NAPERVILLE READY MIX, INC., ET AL., PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether the National Labor Relations Board reasonably concluded that petitioner's decision to reduce labor costs by selling its delivery trucks and subcontracting the delivery work was a subject of mandatory bargaining with the union, when, even after the sale of the trucks, petitioner retained virtually complete control over their use and continued to operate the delivery portion of its business essentially without change.

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In the Supreme Court of the United States

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-23) is reported at 242 F.3d 744. The decision and order of the National Labor Relations Board (Pet. App. 24-75), and the decision of the administrative law judge (Pet. App. 76-101), are reported at 329 N.L.R.B. 174.

JURISDICTION

The judgment of the court of appeals was entered on March 6, 2001. A petition for rehearing was denied on May 17, 2001 (Pet. App. 102-103). The petition for a writ of certiorari was filed on August 13, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner Naperville Ready Mix, Inc. (NRM), produces and delivers concrete for residential construction. Pet. App. 2, 27.[1] Richard Wehrli is petitioner's president. *Ibid.* At all relevant times, petitioner's truck drivers were represented by Teamsters Local 673 (Union). *Ibid.*

On May 7, 1992, during negotiations with the Union for a new collective-bargaining agreement, Wehrli asserted that he wanted to sell petitioner's trucks and have owner-operator subcontractors deliver petitioner's concrete, because petitioner was losing money on the delivery portion of its business. Pet. App. 3, 30. On May 12, Wehrli advised the Union in writing: "I have decided to go out of the trucking business and am offering to sell my trucks to my present drivers first, and then any leftover trucks will be offered to outsiders. I intend to use individual contractors for all my trucking needs." *Id.* at 3, 30-31. On May 15, petitioner sent the Union a written proposal detailing alterations to the collective bargaining agreement that Wehrli believed were necessary to permit petitioner to contract out its delivery work to owner-operators. *Id.* at 4, 32.

On May 20 and 27, 1992, without waiting for the Union's response to the proposal and without the Union's knowledge, Wehrli met with petitioner's

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[1] Two NRM-affiliated companies, T&W Trucking, Inc. (T&W), and Wehrli Equipment Company (WEC), are also petitioners in this Court. Pet. ii. NRM, T&W, and WEC operate as a single integrated enterprise and therefore constitute a single employer for purposes of the National Labor Relations Act. Pet. App. 9-12, 43-47. This brief refers to all of the affiliated companies collectively as petitioner.

drivers. Pet. App. 4, 32. He offered to sell the trucks to the drivers and to assist them with financing and with the mechanics of becoming owner-operators. *Ibid.* Wehrli told the drivers that those who became subcontractors would no longer be covered by the Union's agreement with petitioner. He further stated that, as trucks were sold to current drivers and to new drivers, current drivers who had not purchased a truck would be laid off in reverse order of seniority. *Ibid.*

Petitioner's truck drivers voted to reject petitioner's contract proposals and to authorize a strike, which began on June 17, 1992. Pet. App. 6, 34. Wehrli then proceeded unilaterally with his plan to sell petitioner's trucks to owner-operators. *Id.* at 5, 55. By the last week of June 1992, Wehrli had entered into handshake agreements with five individuals (including both current and new drivers) for the sale of nine trucks. *Id.* at 5, 35-36. Between June 28 and June 30, Wehrli transferred title in those trucks to the new owners. *Id.* at 5, 36.

In exchange for favorable sales terms, which were set by Wehrli, the purchasers relinquished virtually all control over the use of the trucks after the sale. Pet. App. 5, 52-53. The purchasers made no down payment, and Wehrli supplied the financing. The sales contracts required the purchasers to give "first priority" to petitioner's hauling needs and prohibited them from working for its competitors within a 15-mile radius of its plant. *Id.* at 5, 50.

On July 1, 1992, the five owner-operators began hauling concrete for petitioner. Pet. App. 5, 51. Apart from the nominal change in ownership of the trucks, there was no meaningful change in petitioner's day-to-day business of ready-mix hauling. *Id.* at 6, 52. For example, the owner-operators hauled exclusively for peti-

tioner and received their assignments from petitioner's same dispatchers according to essentially the same procedures as before the sale. *Id.* at 6, 51.

On August 18, 1992, petitioner advised the Union in writing that it intended to sell all of its remaining trucks. Petitioner offered the Union a proposal to that end. Pet. App. 7, 38. However, no further negotiations took place. *Id.* at 38.

2. Acting on charges filed by the Union, the General Counsel of the National Labor Relations Board (Board) issued a complaint against petitioner. Pet. App. 8, 25. The complaint alleged, in pertinent part, that petitioner violated Section 8(a)(5) of the National Labor Relations Act (Act), 29 U.S.C. 158(a)(5), by unilaterally transferring bargaining-unit work to non-bargaining-unit employees. Pet. App. 8, 25. Although an administrative law judge initially recommended that the complaint be dismissed (*id.* at 76-101), the Board concluded that petitioner violated Section 8(a)(5) "[b]y transferring and/or subcontracting bargaining unit work to owner-drivers without bargaining in good faith to impasse" with the Union. *Id.* at 67.

The Board found that, although petitioner nominally transferred title of the trucks to new owners, petitioner "did not close its delivery operations or go out of the delivery business." Rather, petitioner "continued to engage in the delivery of ready mix product to construction sites, the only difference being that the work formerly performed by bargaining unit drivers was being done by 'owner-drivers' through an elaborate subcontracting arrangement." Pet. App. 52. Thus, the Board found that petitioner "merely replaced the employees driving the trucks with other employees under the 'owner-operator' rubric * * *, maintaining essentially the same control over them that it had

always enjoyed." *Id.* at 52-53. The Board also found that petitioner had subcontracted the delivery work because of "its concern over the labor costs of a Union contract." *Id.* at 53. The Board concluded that "[s]uch subcontracting is a mandatory subject of bargaining." *Ibid.* (citing *Fibreboard Paper Prods. Corp.* v. *NLRB*, 379 U.S. 203 (1964)).

The Board further found that petitioner had not reached "a genuine impasse in the negotiations with the Union" at the time that petitioner unilaterally commenced the subcontracting of its delivery work. Pet. App. 60. The Board therefore found that petitioner acted unlawfully "through [the] unilateral implementation of its [subcontracting] scheme." *Ibid.* As a remedy, the Board ordered petitioner (among other things) "to restore unit delivery work to the unit employees," and "to offer reinstatement to all employees who lost their jobs as a result of the unlawful transfer of the work outside the unit." *Id.* at 68.

3. The court of appeals enforced the Board's order. Pet. App. 1-23. The court agreed with the Board that "this case is governed by *Fibreboard*." *Id.* at 15. The court explained that, although petitioner was "entitled to sell its trucks," petitioner "was not entitled * * * to shift unit work to non-union subcontractors without first bargaining to impasse with the Union." *Ibid.*

The court found that petitioner "sold the trucks, but it did so as part of a plan that allowed it to remain in the business of delivering ready-mix, albeit using non-union subcontractors instead of bargaining unit employees." Pet. App. 13. As the court explained, "[b]efore and after July 1, 1992, [petitioner]'s business involved the delivery of ready-mix concrete to its customers," and "[n]either the scope nor the manner of this aspect of its business changed in any way after July 1." *Id.* at 14.

The court found that "Wehrli ensured that things would stay functionally the same by carefully structuring the sale of [petitioner]'s trucks to give [petitioner] nearly complete control over how the trucks were used" after the sale. *Ibid.* The court also found "substantial evidence in the record that [petitioner]'s motivation for switching to subcontract haulers was to save on labor costs." *Ibid.* The court noted that "[t]his is precisely the kind of concern that * * * is particularly amenable to resolution through collective bargaining." *Ibid.* (citing *Fibreboard, supra,* and *First National Maintenance Corp.* v. *NLRB,* 452 U.S. 666 (1981)).

The court found it "clear" that petitioner and the Union had not reached an impasse in bargaining for an overall labor agreement when petitioner unilaterally sold the trucks and subcontracted out the delivery work. Pet. App. 15-16. The court also rejected petitioner's contention that the Board's remedy "imposes an 'undue or unfair burden.'" *Id.* at 22. The court found that petitioner had not properly preserved its objection to the Board's remedy. *Ibid.* In any event, the court concluded, there was "no evidence that [petitioner] will have any particular difficulty returning its hauling business to unit employees." *Id.* at 23.

ARGUMENT

The decision of the court of appeals is correct, and it does not conflict with any decision of this Court or of another court of appeals. This Court's review is therefore not warranted.

1. a. Section 8(a)(5) of the National Labor Relations Act (Act), makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees." 29 U.S.C. 158(a)(5). Section 8(d) of the Act explains that the subjects en-

compassed by the duty to bargain collectively include "wages, hours, and other terms and conditions of employment." 29 U.S.C. 158(d). As this Court held in *Fibreboard Paper Products Corporation* v. *NLRB*, 379 U.S. 203 (1964), those provisions require an employer to bargain with the union over a decision whether to "contract[ ] out" work when the employer, in order to reduce labor costs, seeks to "replace[ ] existing employees with those of an independent contractor to do the same work under similar conditions of employment." See *id.* at 213-215. See also *First Nat'l Maint. Corp.* v. *NLRB*, 452 U.S. 666, 679-680 (1981) (reaffirming holding of *Fibreboard*).

In *First National Maintenance*, on the other hand, the Court held that an employer is not legally obligated to bargain with the union over a decision whether "to shut down part of its business purely for economic reasons." 452 U.S. at 686. The Court explained that such a managerial decision, "involving a change in the scope and direction of the enterprise, is akin to the decision whether to be in business at all." *Id.* at 677. The Court further explained that "other types of management decisions, such as plant relocations, sales, other kinds of subcontracting, automation, etc. * * * are to be considered on their particular facts." *Id.* at 686 n.22.

b. Applying those settled principles to the particular facts of this case, the court of appeals correctly concluded that the Board reasonably decided that *Fibreboard*, rather than *First National Maintenance*, governs petitioner's bargaining obligations. As the Board and the court of appeals explained (Pet. App. 12-15, 47-53), the truck sales and transfer of delivery work to owner-operators did not represent "a change in the scope and direction of the enterprise." *First National Main-*

tenance, 452 U.S. at 677. Instead, that transaction was simply a labor-cost driven effort to replace unit employees with unrepresented workers "to do the same work under similar conditions of employment." *Fibreboard*, 379 U.S. at 215.

Although petitioner nominally sold its delivery trucks to the owner-operators, it did *not* close the delivery portion of its business. Pet. App. 14. Rather, petitioner continued, as before, to deliver the ready-mix concrete produced at its plant to its customers' construction sites, and it structured the truck sale transactions to ensure that it would retain "nearly complete control over how the trucks were used." *Ibid.* The manner in which petitioner's deliveries were made by the owner-operators after the sale of the trucks was essentially no different from the manner in which the deliveries had been made by the unit drivers prior to the sale of the trucks. *Ibid.* In short, as the court of appeals found, "[t]he only identifiable difference in how [petitioner] hauled ready-mix concrete" after the sale of its trucks was that "the drivers of the trucks were no longer covered by the Union's collective bargaining agreement." *Ibid.*

2. a. In this Court, petitioner concedes that the Board "rightly focused on the extent to which [petitioner] continued to control the trucks after their sale." Pet. 8. Indeed, petitioner repeatedly asserts (*e.g.*, Pet. 20) that "the level of asset and workforce control distinguishes *Fibreboard* subcontracting from a *First National Maintenance* entrepreneurial partial closing." See also Pet. 11, 18. Petitioner faults the court of appeals, however, for (purportedly) "finding instead that [petitioner]'s bargaining obligations hinged exclusively on whether [petitioner] considered labor costs in its decision to sell its trucks and subcontract its delivery

work." Pet. 8; see also Pet. 14. There is no merit to petitioner's contention, which is based on a mischaracterization of the court of appeals' decision.

The court of appeals' holding that "this case is governed by *Fibreboard*" (Pet. App. 15) does not turn "exclusively on whether [petitioner] considered labor costs." Pet. 8. Rather, the court, as expressly authorized by *Fibreboard*, took into account petitioner's labor-cost motivation as one among several factors in determining that *Fibreboard* rather than *First National Maintenance* applies. See Pet. App. 13-15; *Fibreboard*, 379 U.S. at 213-214. In particular, the court of appeals explicitly considered whether petitioner continued to control the use of the delivery trucks after their sale to the owner-operators. See Pet. App. 5-6, 14. That is the same test that petitioner now urges before this Court.

As described above, far from ignoring the issue of continued control over the trucks, the court of appeals specifically found, as had the Board (Pet. App. 52-53), that "Wehrli ensured that things would stay functionally the same by carefully structuring the sale of [petitioner]'s trucks to give [petitioner] *nearly complete control* over how the trucks were used" after the sale. *Id.* at 14 (emphasis added). The court emphasized (*id.* at 5) that the purchasers of the trucks "gave up almost all control over the use of the trucks" in exchange for favorable sales terms from Wehrli.[2] Moreover, after

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[2] In describing the control retained by petitioner, the court of appeals noted that, "[m]ost importantly, there was a 'first priority' provision that required the buyers to give first priority to the hauling needs of [petitioner] so long as [petitioner] provided reasonable notice of its intent to use the subcontractor." Pet. App. 5. The first priority requirement "continued until the principal on the truck was paid off." *Ibid.* Also, "[t]he sales contract forbade the buyers from working for [petitioner]'s competitors within a

the sale of the trucks, "the drivers still received their orders from the same dispatcher and in accordance with essentially the same procedures previously used." *Id.* at 14. Although petitioner argues (*e.g.*, Pet. 18, 25) that it did not retain control over the trucks after title formally passed to the owner-operators, the contrary factual findings of the Board and the court of appeals raise no issue warranting this Court's attention. See *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 490-491 (1951).

There is no merit to petitioner's suggestion (Pet. 18) that *Fibreboard* is inapplicable to this case simply because *Fibreboard* did not involve a sale of assets, whereas petitioner sold its trucks. As noted above, although petitioner sold the trucks, it did not leave the ready-mix delivery business. Rather, after the sales, "[n]either the scope nor the manner of this aspect of its business changed in any way," and petitioner retained "nearly complete control over how the trucks were used." Pet. App. 14. Nothing in *Fibreboard* or in *First National Maintenance* precludes the Board from finding that, in these circumstances, petitioner's decision to subcontract unit work was a mandatory bargaining subject, merely because petitioner implemented that decision through a nominal sale of assets.

b. Petitioner also errs in asserting (Pet. 23-28) that, in order to find that petitioner continued to control the trucks after title passed to the owner-operator purchasers, the Board was required to find, as a threshold

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fifteen mile radius of [petitioner]'s plant." *Ibid.* Finally, Wehrli retained a security interest in the trucks, "under which he was entitled to find a buyer in default if [petitioner] had a good faith belief that the driver was failing to perform the terms of the sales contract." *Ibid.*

matter, that petitioner was an "alter ego" of the purchasers. See *Howard Johnson Co.* v. *Detroit Local Joint Exec. Bd.*, 417 U.S. 249, 259 n.5 (1974) (explaining that an entity is an "alter ego" of another entity if it is merely a "disguised continuance" of that entity). *Fibreboard*, upon which the Board relied here, does not hold that subcontracting is a mandatory bargaining subject only if the employer is an "alter ego" of the entity to which it wishes to subcontract unit work. Nor is there any authority for such a proposition.

There is also no merit to petitioner's contention (Pet. 23, 25) that the Board was required to undertake an alter ego analysis because it used the term "sham" in describing the truck sales transactions. See, *e.g.*, Pet. App. 51. As the court of appeals explained, "[t]he Board was saying only that the transactions were * * * 'sham,' insofar as their employment consequences were concerned." *Id.* at 12-13. As discussed above, the record in this case amply supports that characterization of the truck sales.[3]

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[3] Petitioner incorrectly suggests (Pet. 26) that the decision in this case conflicts with *Douglas Foods Corporation* v. *NLRB*, 251 F.3d 1056 (D.C. Cir. 2001). That case did not involve the question presented here—whether an employer's decision to effectuate a subcontracting scheme by means of a sale of assets designed for that purpose is, in accordance with *Fibreboard*, a mandatory subject of bargaining under Section 8(a)(5) of the Act. *Douglas Foods* involved instead the question whether an asset sale violated Section 8(a)(3) of the Act because it was motivated by anti-union animus. See 251 F.3d at 1060. The Board had found that the sale was improperly motivated because it was a sham transaction between alter egos. *Id.* at 1062. The court of appeals concluded that the Board's determination that the employer and the purchaser were alter egos was not supported by substantial evidence. *Ibid.* The court cited the court of appeals' decision in the present case, with apparent approval, in support of the proposition that the

3. Petitioner errs in contending (Pet. 14-16, 19-20) that the decision of the court of appeals in this case conflicts with decisions of other courts of appeals.

In *Arrow Automotive Industries, Inc.* v. *NLRB*, 853 F.2d 223 (4th Cir. 1988) (cited at Pet. 15), the employer decided to shut down one of its plants and to move the work being performed there to another plant in a different State. 853 F.2d. at 223. The court concluded that the employer's decision "qualified as a 'significant change in operations,'" concerning which mandatory bargaining was not required under *First National Maintenance*. *Id.* at 228. No such significant change to petitioner's delivery operation occurred here. See pp. 7-8, 9-10, *supra*. Moreover, the court in *Arrow Automotive* pointed out that the case before it did not involve "an attempt on the part of an employer to subcontract part of the work of an ongoing operation." *Id.* at 231. This case, in contrast, involves precisely that situation.

Petitioner's reliance on *Dorsey Trailers, Inc.* v. *NLRB*, 134 F.3d 125 (3d Cir. 1998) (cited at Pet. 16), is also mistaken. In that case, the court found that the employer had decided to subcontract out unit work not, as in this case, to reduce labor costs, but in order to "avoid lost sales," which it would have otherwise sustained because of a lack of qualified welders and insufficient capacity at its unionized plant. *Id.* at 132. The court further found that the subcontracting in that case had no "adverse impact on the bargaining unit." *Id.* at 133. In this case, by contrast, the bargaining unit clearly was adversely impacted because delivery work

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Board generally "did not invoke [the] 'sham transaction' doctrine [that it had invoked in *Douglas Foods*] where legal transfer of title was undisputed." *Id.* at 1064.

was transferred out of the unit and several employees lost their jobs.

Finally, *NLRB* v. *Adams Dairy, Inc.*, 350 F.2d 108 (8th Cir. 1965), cert. denied, 382 U.S. 1011 (1966) (cited at Pet. 19), is also inapposite. There, the court found that "a basic operational change [took] place when the dairy decided to completely change its existing distribution system." 350 F.2d at 111. Rather than continue to deliver its products through its "driver-salesmen," the dairy decided to sell its products at the plant dock to independent distributors, who also bought the dairy's delivery trucks. *Ibid.* The dairy did not finance the sale or arrange financing. *Ibid.* The routes driven by the new independent distributors did not correspond to the previous routes of the driver-salesmen. *Ibid.* Moreover, the independent distributors "were solely responsible for selling the products," which had not been the case before the sale of the delivery trucks. *Ibid.* Finally, the dairy had "no concern with what was done with the products," and the dairy placed few substantial restrictions on the manner in which the independent distributors operated. *Ibid.* The facts in this case, in which petitioner continued to operate its delivery business essentially without change, through its own dispatchers, are starkly to the contrary.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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